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Supreme Court, U.S.
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No. __-___

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,

Petitioner,

v.

NILO D. TUAZON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BRADLEY S. KELLER
WILLIAM H. WALSH
BYRNES & KELLER, LLP
1000 Second Avenue,
38th Floor
Seattle, WA 98104
(206) 622-2000

DONALD B. AYER
(Counsel of Record)
ROBERT F. MCDERMOTT, JR.
PAUL S. RYERSON
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

May 30, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether product sales and sales-related activities in the forum state can constitute sufficient minimum contacts to support the exercise of general jurisdiction over a company incorporated and headquartered elsewhere, and thus allow suit on claims having no connection to the forum.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below are contained in the caption of this case.

Petitioner R.J. Reynolds Tobacco Company, a North Carolina corporation, is the successor by merger to appellant R.J. Reynolds Tobacco Company, a New Jersey Corporation. The existing R.J. Reynolds Tobacco Company is a wholly owned, indirect subsidiary of Reynolds American, Inc., which is a North Carolina corporation. Brown & Williamson Holdings, Inc. holds more than 10% of the stock of Reynolds American, Inc.

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PETITION FOR CERTIORARI

R.J. Reynolds Tobacco Company ("Reynolds") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, upholding the jurisdiction of the District Court for the Western District of Washington to entertain a lawsuit against Reynolds, incorporated and headquartered in North Carolina, by a citizen of the Philippines, seeking recovery for illnesses incurred in the Philippines after smoking Reynolds products for several decades while resident there.

OPINION AND JUDGMENT BELOW

The opinion of the court of appeals (Pet. App. 3a-30a) is reported at 433 F.3d 1163. An order and amended order of that court denying rehearing and rehearing en banc (Pet. App. 1a-2a) are unreported. The opinion of the district court (Pet. App. 32a-44a) and its order certifying interlocutory appeal (Pet. App. 31a) are also unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 11, 2006. A timely motion for rehearing and rehearing en banc was denied on March 7, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of Section 1 of the Fourteenth Amendment, which provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law...." U.S. CONST. AMEND. XIV, § 1.

The case also involves the Due Process Clause of the Fifth Amendment, which provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law...." U.S. CONST. AMEND. V.

STATEMENT OF THE CASE

Respondent Nilo D. Tuazon ("Tuazon"), the plaintiff below, is a citizen of the Republic of the Philippines, where he lived for the first 65 years of his life. Pet. App. 22a n.6; Appellant's Excerpts of Record at ER 29-30 ("Excerpts of Record"), *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163 (9th Cir. 2006). R.J. Reynolds Tobacco Corporation ("Reynolds"), the defendant below, is a company incorporated and having its principal place of business in North Carolina.[1] Tuazon sued Reynolds in the Western District of Washington, invoking that court's diversity jurisdiction.

Tuazon was born in the Philippines in 1938. At the age of 17 he began smoking Salem cigarettes, which had been sold through a Philippine licensee of a former Reynolds affiliate. Pet. App. 3a-5a. About 10 or 15 years ago, Tuazon began to experience health conditions that he attributed to his smoking, and at that time his physicians and others advised him to stop smoking. More recently, he was diagnosed with a chronic lung disorder. *Id.* Tuazon is both a member of the Philippine bar and a plaintiff in the Philippine courts. While still living in the Philippines, Tuazon began researching cases filed in the United States against tobacco companies to assist him in filing his complaint. Pet. App. 4a; Excerpts of Record at ER 30, 45-46. However, he decided not to bring his claims in the Philippines, fearing that any award he would receive would be "niggardly" or "ridiculously low." Pet. App. 24a; Excerpts of Record at ER 44-45.

Tuazon immigrated to Renton, Washington, in April 2003. Pet. App. 4a. He filed this case within eight days of his arrival in the United States. Excerpts of Record at ER 30, 49. Tuazon retains a personal residence and substantial

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[1] At the time plaintiff filed suit, and prior to a corporate reorganization that took place on July 30, 2004, Reynolds was incorporated in New Jersey.

property interests in the Philippines, and expects to return there for periodic visits. Excerpts of Record at ER 38-40.

Tuazon alleges that a supposed "global conspiracy" to suppress health-related information kept him from learning about the dangers of Reynolds' product. Pet. App. 5a, 32a. He claims that this alleged conduct violated his rights under the laws of the Philippines, which are asserted to apply to the claims in this case. Pet. App. 20a; Excerpts of Record at ER 2. Tuazon alleges that conduct relevant to his claim occurred in a variety of places, including in the United States, but he does *not* assert that his claim arises out of any conduct occurring in the State of Washington. Pet. App. 7a, 20a, 32a. Tuazon acknowledges that his alleged tobacco-related disease developed while he was in the Philippines. *Id.*

Reynolds is neither incorporated nor headquartered in Washington, and maintains no executive offices or manufacturing operations there. Excerpts of Record at ER 10. Its activities in Washington "are no greater in kind than [its] activities . . . in any other state." *Id.* at 11.

Reynolds sells cigarettes in the State of Washington, in numbers roughly proportionate to Washington's share of the United States population. Its annual sales there of $145-240 million amount to about 2.6% of Reynolds' domestic sales. Pet. App. 4a. Reynolds is licensed to do business in Washington and engages in activities necessary to support its sales there, including contracting with a local warehouse company for storage and delivery of products and leasing an office. Pet. App. 15a, 33a. Six or seven permanent employees have worked at the office, with an additional 32 or 33 sales personnel working out of their homes. Pet. App. 33a; Excerpts of Record at ER 11. Reynolds advertises its products to Washington consumers, has conducted market research there, and has engaged in political lobbying opposing laws that would have banned or limited smoking or cigarette advertising. Pet App. 4a-5a. In addition, Reynolds

has provided research grants to the University of Washington. *Id.*

Based on these facts, Reynolds filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction[2] and, in the alternative, on *forum non conveniens* grounds. The parties thereupon took discovery relating to jurisdictional issues, including interrogatories, a deposition of Tuazon, and document production. The district court denied Reynolds' motion on March 17, 2004, Pet. App. 44a, and certified its Order for immediate appeal pursuant to 28 U.S.C. § 1292(b). Pet. App. 31a. The Ninth Circuit accepted certification.

In its opinion dated January 11, 2006, the Ninth Circuit (McKeown, J.) affirmed the district court's decision. The court queried "first, whether Washington's jurisdictional statute confers jurisdiction over Reynolds." Upon finding that it did, the court turned to the question "whether the exercise of jurisdiction comports with federal due process requirements." Pet. App. 7a.

The court below stated that "minimum contacts exist where a defendant has 'substantial' or 'continuous and systematic' contacts with the forum state." Pet. App. 10a. The court discussed this Court's decisions in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), and *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). The court remarked that "navigating the territory between *Perkins* and *Helicopteros* requires us to balance the facts of each case," and noted that Ninth Circuit precedent has "not . . . articulated a definitive litany of factors" to assist in this navigation. Pet. App. 12a (citing

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[2] Tuazon never claimed that Reynolds was subject to specific jurisdiction—based on events occurring in Washington—so the only issue was whether Reynolds was amenable to general jurisdiction there. Pet. App. 7a, 34a.

Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000)).

While recognizing that "a corporation does not necessarily submit to general jurisdiction in every state in which it merely sells a product," Pet. App. 16a-17a, the Ninth Circuit nonetheless found that contacts sufficient to establish general jurisdiction were present here:

> The magnitude of Reynolds' operations and sales in Washington reflects an undeniable presence in the state; it has held a license to do business there since 1940, has advertised in purely local publications since at least the 1950s, has engaged in local political activity to protect its market,[3] and maintains a permanent office and workforce in the state.
>
> . . .
>
> Although limited sales and licensing arrangements alone may be insufficient to establish general jurisdiction, Reynolds' decades long presence and its integration into Washington's markets can hardly be characterized as "mere" interaction with the state.
>
> . . .
>
> Although general jurisdiction is infrequently exercised, to conclude that it exists here does not mean that every case of failed specific jurisdiction will lead to the grant of general jurisdiction. The determination simply depends upon the nature and extent of the contacts.
>
> . . .

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[3] The Ninth Circuit described Reynolds' political activities as "local opposition to city and state legislation that would have banned or limited smoking and cigarette advertising." Pet. App. 4a-5a.

> [W]e hold that Reynolds' continuous and substantial contacts are sufficient to support the exercise of general jurisdiction.

Pet. App. 15a-17a.

The court also determined, based on this Court's guidance in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), that the exercise of general jurisdiction over Reynolds in the State of Washington in this instance was reasonable, Pet. App. 17a-21a, and that dismissal on grounds of *forum non conveniens* would be improper. Pet. App. 21a-30a. In both of these rulings, the court relied significantly on the interest of the plaintiff in obtaining, and the State in providing, a forum for a person resident there. Pet. App. 19a, 27a.

On March 7, 2006, the Ninth Circuit denied Reynolds' petition for rehearing and rehearing en banc, Pet. App. 1a-2a, whereupon Reynolds filed this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The decision below amounts to a holding that any large corporation that engages in substantial sales and sales-related activities across the nation satisfies the due process minimum contacts test for general jurisdiction in any State of the union. Under this test, manufacturing corporations like Petitioner Reynolds that sell their products in most or all states of the union, and thus engage in a systematic and ongoing array of advertising, marketing, and distribution activities throughout the country, will be found to possess sufficient minimum contacts to support suit in most or all states on claims having no connection whatsoever to those states. The Ninth Circuit thus joins a growing list of federal

circuits that in recent years have upheld general jurisdiction based on sales-related activities.[4]

These rulings are flatly at odds with longstanding authority in this Court, and contrary to the common practice in our courts, under which litigation is most commonly brought in the jurisdiction in which the harm occurs. They are also contrary to clear holdings in several other circuits that the sales and promotion of products in a state do not constitute the minimum contacts required for general—as distinguished from specific—jurisdiction.

While a court's power to exercise jurisdiction over a prospective defendant historically depended on the party's actual presence in the jurisdiction, *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877), where corporations are concerned, this Court long ago recognized that "the terms 'present' or 'presence' are used merely to symbolize those activities of [a] corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945). The critical analysis turns on whether the defendant corporation "has certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316 (internal quotation marks omitted).

In a series of cases, this Court has discussed the nature of the minimum contacts analysis as the threshold limitation[5]

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[4] As discussed *infra*, at 18 n.9, several state Supreme Courts have also upheld the assertion of general jurisdiction based on sales-related activities.

[5] The Question Presented here addresses only the threshold Due Process issue whether Reynolds has minimum contacts with Washington sufficient to support general jurisdiction, and not the second question of whether, if there are such minimum contacts, jurisdiction must nonetheless be denied as unreasonable under the factors articulated in *Asahi*, 480 U.S. at 113.

on jurisdiction over non-resident corporations. The Court has noted repeatedly that, in determining whether a particular exercise of jurisdiction is consistent with due process, the inquiry must focus on "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977), *quoted in Calder v. Jones*, 465 U.S. 783, 788 (1984); *Keeton v. Hustler Magazine*, 465 U.S. 770, 775 (1984); *Rush v. Savchuk*, 444 U.S. 320, 327 (1980). Accordingly, the analysis is not "simply mechanical or quantitative," looking at "whether the activity [of a corporation within the forum state] is a little more or a little less." *Int'l Shoe*, 326 U.S. at 319. It focuses, most basically, on the relationships between the defendant's particular conduct in the forum, and the harms that are the subject matter of the lawsuit.

Thus, as the Court noted in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), where a manufacturer promotes and sells "its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others." *Id.* at 297. This kind of jurisdiction, which exists because "a controversy is related to or 'arises out of' a defendant's contacts with the forum," is referred to as "specific jurisdiction." *Helicopteros*, 466 U.S. at 414 & n.8.

The Court has also addressed the question of whether, and under what circumstances, a corporation may be subjected to

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(continued...)

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen Corp. [v. Woodson,]* 444 U.S. [286, 292 (1980)] (citations omitted).

"general jurisdiction"—that is, held to answer for claims that do not arise from or relate to events occurring in the forum state. Again, historically the question was characterized as one of presence in the forum. Thus, much as jurisdiction for all purposes may be secured over a natural person based on his physical presence in the forum, *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990), a corporation may be sued on any matter, arising in the forum or not, in the jurisdiction where it is incorporated or is headquartered. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144 (1966), *cited in Helicopteros*, 466 U.S. at 415 n.9. Beyond that core instance of corporate "presence" in the forum, this Court has declined to articulate any qualitative rules to guide courts in determining whether sufficient contacts exist to confer general jurisdiction over corporations.

Instead, the Court has repeated the overarching litany of *International Shoe*, that there must be minimum contacts "sufficient" to render the assertion of jurisdiction consistent with "traditional notions of fair play and substantial justice." *E.g.*, *Helicopteros*, 466 U.S. at 414 (internal quotation marks omitted). As a result, lower courts are left to scrutinize the outcomes of a handful of cases decided over the last century in an effort to discern how far to go in asserting jurisdiction over a non-resident corporation as to claims unrelated to the forum. These decisions of this Court suggest that such open-ended jurisdiction over unrelated matters is very strictly confined.

This Court's decision in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), represents the high-water mark for general jurisdiction. There, the Ohio courts had entertained claims against a Philippine mining company that were unrelated to any activities in the State of Ohio. The case presented the unique circumstance that the Japanese occupation of the Philippines had caused the company's president to relocate its offices to Ohio, from which location

he conducted the activities of the business. There, he kept company files, held directors' meetings in the office, carried on correspondence relating to the business, distributed salary checks drawn on Ohio bank accounts, engaged an Ohio bank to act as a transfer agent, and supervised policies dealing with rehabilitation of the corporation's properties in the Philippines. *See Id.* at 448. In short, "he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company." On this basis, the Court "conclude[d] that . . . it would not violate federal due process for Ohio . . . to take . . . jurisdiction of the corporation in this proceeding." *Id.*

Since *Perkins*, the Court has twice suggested that contacts of a quality falling well short of general business operations in the forum cannot support jurisdiction over causes of action unrelated to that forum. In *Keeton v. Hustler Magazine, Inc.* 465 U.S. 772, 779 & n.11 (1984), the Court compared the defendant's contacts with the New Hampshire forum with the "general business" activities present in *Perkins*, and concluded that sales of magazines in the forum "may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities." And in *Helicopteros*, 466 U.S. at 416, the Court posed the question as whether the contacts there "constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*." It concluded that contacts, which included the purchase of helicopters and training of personnel in the forum state, failed to meet that test.

These modern decisions are in accord with a series of cases from the early twentieth century in which the Court repeatedly declined to uphold jurisdiction over claims unrelated to the forum, where defendant's relevant contacts were limited to sales and solicitation activities in the forum state. *See People's Tobacco Co. v. Am. Tobacco Co.*, 246 U.S. 79, 85-87 (1918) (advertising, selling cigarettes to in-state distributors, and sending agents to solicit orders from retailers to be filled by the distributors did not support suits

unrelated to forum activity); *Simon v. S. Ry. Co.*, 236 U.S. 115, 130 (1914) (even assuming defendant railroad, a Virginia corporation, did business in Louisiana, service of process in accordance with Louisiana law was insufficient to give Louisiana court jurisdiction over cause of action for injuries sustained in Alabama); *Green v. Chicago, Burlington & Quincy Ry. Co.*, 205 U.S. 530, 533 (1907) (where defendant railroad had no track or property in the forum State, its employment of an agent and maintenance of an office in the forum, through which it solicited "considerable" passenger and freight business, did not support jurisdiction over claims unrelated to the forum); *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 20-22 (1907) (no jurisdiction in Pennsylvania over claims by Pennsylvania residents based on policy issued in Indiana, because "the business was not transacted in Pennsylvania," even assuming defendant insurance company did business in Pennsylvania).[6]

I. There Is Substantial Disagreement in the Circuits on the Recurring Question Whether Sales and Sales-Related Activities in the Forum Can Constitute Minimum Contacts Sufficient to Support General Jurisdiction

This Court has made clear that the sufficiency of minimum contacts depends on the quality rather than the

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[6] In *St. Louis Sw. Ry. Co. v. Alexander*, 227 U.S. 218 (1913), the Court upheld the jurisdiction of New York courts over a railroad that operated no trains in the State, where a single bill of lading provided for delivery of poultry to New York City by "two [rail]roads [that] together constitute a continuous line from St. Louis [to New York]," *id.* at 228, and required that claims be made "at the point of delivery or at the point of origin" as an essential prerequisite to liability. *Id.* at 222. This consolidated line—the "Cotton Belt Route"— retained a joint freight agent in New York, with whom plaintiff initially pursued his claim for deficient handling of the poultry, filing litigation there only after those efforts at settlement had failed. *Id.* at 225-26.

quantity of a corporation's activity in the forum. At the same time, it has declined to draw any explicit distinctions as to the nature of corporate activities that will suffice to support general jurisdiction. It is therefore not surprising that the circuits have become badly divided on the most commonly recurring question in this area: whether activities conducted to achieve the sales of products in a state, in the absence of general corporate presence unrelated to sales, can suffice to confer jurisdiction over the corporation for all purposes. The decision below rested squarely on the longstanding activities of Reynolds in Washington state, all of which related directly to the marketing and sales of its products there. In that regard, Reynolds' activities in Washington are much like those of countless national and international corporations. The vast majority of products purchased and used by American consumers are mass produced, advertised and sold throughout the nation or the world.

Since this Court's decisions early in the last century discussed above, the dominant view of American courts has been that sales-related activities do not constitute minimum contacts sufficient for general jurisdiction. That rule is implicit in the decisions of many courts in many cases. A number of modern federal cases have put a finer point on it. In particular, the First, Fourth, Fifth, and Eleventh Circuits, in rendering decisions declining to find general jurisdiction where the central argument for the contrary outcome rested on the sales of goods, have made statements in the course of their rulings indicating the insufficiency of such contacts as a basis for general jurisdiction.

In *Glater v. Eli Lilly & Co.*, 744 F.2d 213, 217 (1st Cir. 1984), the First Circuit declined to allow product liability claims relating to use of a medical device to proceed in a New Hampshire federal court, where the device was used and the alleged injury occurred in Massachusetts, notwithstanding the defendant's concession that its products were sold in New Hampshire through a number of wholesale

distributors located there. Quoting its own earlier decision to the same effect in *Seymour v. Parke, Davis & Co.*, 423 F.2d 584, 586-87 (1st Cir. 1970), the First Circuit stated that "where 'defendant's only activities consist of advertising and employing salesmen to solicit orders, we think that fairness will not permit a state to assume jurisdiction.'"

In *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195 (4th Cir. 1993), the Fourth Circuit reached a similar conclusion on similar facts. As in *Glater*, plaintiffs claimed injury from use of a medical device. The only connection of either party to the Maryland forum was the fact that defendant employed between 17 and 21 "detail representatives and consumer product representatives," most of whom were residents of Maryland. *Id.* at 1198. "As a result of these representatives' efforts, Searle had $9,000,000-$13,000,000 annual sales in Maryland between 1983 and 1987, which constituted approximately two percent of its total sales." *Id.* After discussing two of its own prior decisions that diverged on distinguishable facts, the court cited *People's Tobacco Co.*, 246 U.S. 79, among other cases, "holding that advertising and solicitation alone do not justify general jurisdiction." 991 F.2d at 1199. Ultimately, the court "[found] the case at bar controlled by *Ratliff [v. Cooper Labs., Inc.*, 444 F.2d 745 (4th Cir. 1971)]'s rule that [product] advertising and solicitation activities alone do not constitute the 'minimum contacts' required for general jurisdiction." 991 F.2d at 1200.

In *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987), the Fifth Circuit addressed whether a federal court in Texas could assert jurisdiction over a Kansas aircraft manufacturer in connection with an air crash in Mississippi, based on the fact that, over a five-year period, defendant had sold nearly $250 million worth of aircraft and parts in Texas, thanks in part to nationwide advertising and a network of independent dealers located in Texas. *Id.* at 372. Emphasizing the absence of any contacts between the forum and any party to the case, and the care taken by defendant to

conduct its affairs so as to "shield it from the general jurisdiction of the courts of other states such as Texas," the court concluded that the fact that defendant "has engaged in a nationwide advertising program [to promote sales through independent dealers] does not support a finding of general jurisdiction." *Id.* at 376; *see also Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 218 (5th Cir. 2000) (finding insufficient contacts for general jurisdiction based on contacts including sales of products to entities located in the forum.)

And in *Madara v. Hall*, 916 F.2d 1510 (11th Cir. 1990), a libel action was brought in Florida based on statements made by defendant musician in New York and published in Florida and elsewhere by a magazine not party to the suit. Plaintiff asserted both specific and general jurisdiction, and the Eleventh Circuit rejected both theories. In connection with plaintiff's efforts to predicate general jurisdiction on defendant's concerts and record sales in the state, the court concluded:

> If Hall could be sued on an unrelated cause of action because of concerts and record sales, then he likely would be amenable to suit in all the states of the union on any cause of action. We reject without further discussion the possibility that Hall is generally present in Florida for jurisdictional purposes based on these contacts.

Id. at 1516 n.7; *see also Associated Transp. Line, Inc. v. Productos Fitosanitarios Proficol El Carmen S.A.*, 197 F.3d 1070, 1075 (11th Cir. 1999) (rejecting an assertion of general jurisdiction based on sales in the forum and noting that "[g]eneral jurisdiction has been found lacking even where a company had employees, agencies and salespeople regularly in the forum").

Finally, in contradicting the longstanding principle that activities within a state to promote sales of products are not

themselves sufficient to support general jurisdiction, the Ninth Circuit below also acted contrary to its own prior decision in *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240 (9th Cir. 1984). There, the court found insufficient contacts in California to support general jurisdiction over a West German corporation that used "independent nonexclusive sales representatives" to solicit product orders in California by, among other means, maintaining a showroom display in San Francisco and attending trade shows and sales meetings in the State. In rejecting the assertion of general jurisdiction, the Ninth Circuit noted that "no court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert jurisdiction in an unrelated cause of action." *Id.* at 1242. The Ninth Circuit also observed that "[t]his court has stated that the *Perkins* holding that the cause of action need not arise out of the defendant's activities in the forum is limited to its unusual facts." *Id.*[7]

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[7] There is also substantial clear authority in the State courts that sales of products in the forum State is an insufficient basis on which to predicate general jurisdiction over a corporate defendant located elsewhere. *See, e.g., John Norrell Arms, Inc. v. Higgins*, 962 S.W.2d 801, 804 (Ark. 1998) (forum sales "manifestly insufficient" for general jurisdiction); *Fisher Governor Co. v. Superior Court*, 347 P.2d 1, 3 (Cal. 1959) ("[M]ore contacts are required for the assumption of [general] jurisdiction than sales and sales promotion within the state by independent nonexclusive sales representatives."); *Hughes v. A.H. Robins Co.*, 490 A.2d 1140, 1150-51 (D.C. 1985) (solicitation, advertising, and $3 million in forum sales "cannot be deemed 'substantial' within the meaning of *International Shoe*"); *Wainscott v. St. Louis-San Francisco Ry. Co.*, 351 N.E.2d 466, 471, 474 (Ohio 1976) (maintenance of two forum sales offices and agents, for purpose of soliciting business on out-of-state rail lines, insufficient for general jurisdiction); *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 807, 809-10 (Tex. 2002), *cert. denied*, 537 U.S. 1191 (2003) (Texas sales amounting to 3.5% of worldwide sales, safe-deposit agreements with Texas residents, and research contract with University of Texas qualitatively insufficient for general jurisdiction).

Notwithstanding the weight of this Court's venerable case law disapproving general jurisdiction based on a non-resident corporation's sales-related activities in a forum State, and those federal circuit decisions adhering to that position, since this Court last addressed the due process limits on general jurisdiction in 1984, a significant counter-trend has developed in a number of federal circuits.

First, in 1989, in *Michigan National Bank v. Quality Dinette, Inc.*, 888 F.2d 462 (6th Cir. 1989), the Sixth Circuit affirmed the existence of minimum contacts sufficient to support general jurisdiction entirely on the ground that an Alabama corporation manufacturing furniture solicited orders and sold its products in the State of Michigan. Plaintiff, a Michigan bank, was thus allowed to proceed in Michigan against the Alabama defendant on claims unrelated to any of its Michigan sales activities. The Sixth Circuit reasoned:

> Although appellees have no real estate, bank accounts or telephone listings in Michigan, they do retain an independent sales representative in the state and conduct mail order solicitations of Michigan businesses. Similarly, although appellees did not participate in trade shows or other promotional events in Michigan, appellees nevertheless made over 400 sales totaling over $625,000 in 1986 and 1987. These factors, along with the fact that appellees made at least one sale in Michigan each and every month during 1986 and 1987, indicate that appellees have conducted a "continuous and systematic part of their general business" in Michigan.

Id. at 466. *But cf. Conti v. Pneumatic Prods. Corp.*, 977 F.2d 978, 981 (6th Cir. 1993) (annual sales of over $900,000 through two independent distributors held insufficient to support general jurisdiction).

Next, in 1996, in *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir. 1996), the Second Circuit found that the St. Louis manufacturer of a "curtain wall system" for a building in Florida had sufficient minimum contacts for general jurisdiction in the Vermont forum, based on product sales activities there. The court cited sales of nearly $4 million worth of its products in that state over a six-year period, supportive national advertising, defendant's relationship with builders and dealers in Vermont, and related promotional activities there. The court's reasoning to that effect was *dicta*, because the court ultimately rejected the assertion of jurisdiction on reasonableness grounds. *See id.* at 575.

In 2000, in *LSI Industries Inc. v. Hubbell Lighting, Inc.*, 232 F.3d 1369 (Fed. Cir. 2000), the Federal Circuit similarly found minimum contacts, and affirmed the assertion of general jurisdiction in Ohio, over a Connecticut corporation headquartered in Virginia, based on the company's sale of products unrelated to the subject of the lawsuit:

> Based on Hubbell's millions of dollars of sales of lighting products in Ohio over the past several years and its broad distributorship network in Ohio, we find that Hubbell maintains "continuous and systematic" contacts with Ohio. Therefore, Hubbell is subject to general jurisdiction in Ohio under the Due Process Clause.

Id. at 1375.

Finally, in 2004, in *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070 (8th Cir. 2004), *cert. denied*, 543 U.S. 1147 (2005), the Eighth Circuit joined the group of circuits willing to uphold the assertion of general jurisdiction on the basis of sales activities within the State. The court acknowledged that defendant, Sherwin Williams, was incorporated and had its principal place of business in Ohio, and that the subject matter of the suit was unrelated to any activities carried on in

the forum (Arkansas). Nonetheless, it found sufficient minimum contacts to support general jurisdiction, based primarily on the fact that defendant "operates retail stores in Arkansas and has a registered agent for service of process there."[8] *Id.* at 1075.[9]

Accordingly, the Court should grant certiorari to resolve the substantial and growing split in the federal circuits on the question whether sales-related activities in the forum State are sufficient minimum contacts to support general jurisdiction.[10]

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[8] The Eighth Circuit's holding appears to rest primarily on the presence of Sherwin Williams retail stores in Arkansas. While the decision mentions Sherwin Williams' registered agent, the decision does not appear to rest on Eighth Circuit case law suggesting that the mere fact of having a registered agent in a State can amount to consent to general jurisdiction. *See Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990). Indeed, the idea that "mere service on [a corporation's registered agent] automatically confers *general jurisdiction* displays a fundamental misconception of corporate jurisdictional principles." *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) (emphasis in original). That much has been clear for nearly a century. *See Simon*, 236 U.S. at 130 (relying on "the principle laid down in *Old Wayne Mut. Life Assoc. v. McDonough*, 204 U.S. 22 (1907), that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states").

[9] General jurisdiction based on sales-related activities in the forum has likewise been upheld by several State courts. *See, e.g., Ex parte Newco Mfg. Co.*, 481 So. 2d 867, 869 (Ala. 1985) ("privilege of making [forum] sales" of up to $85,000 annually, through mail, phone, and one single independent sales representative sufficient for general jurisdiction); *Glover v. W. Air Lines, Inc.*, 745 P.2d 1365, 1368 (Alaska 1987) (holding that franchisor's receipt of $11,000 from in-forum franchisee was "more than sufficient" to be a "substantial" contact justifying general jurisdiction); *Dillon v. Numismatic Funding Corp.*, 231 S.E.2d 629, 632 (N.C. 1977) (holding that solicitation and sales of $50,000 over 21 months, along with one forum visit, was sufficient for general jurisdiction).

[10] The unresolved nature of this issue has been noted in the academic literature. *See, e.g.*, Patrick J. Borchers, *The Problem with General*

II. The Sufficiency *Vel Non* of Sales Activities as Minimum Contacts Supporting General Jurisdiction Is a Frequently Recurring Question That Implicates Fundamental Principles of Fairness and Federalism

It bears repeating that the measure and character of minimum contacts that will suffice to subject a defendant to suit by all comers on any and all claims is a question of constitutional dimensions. With the long-arm statutes of nearly all states extended to the limit of the Due Process Clause,[11] "traditional notions of fair play and substantial justice" embodied in the Fifth and Fourteenth Amendments largely define the geographical reach of state and federal courts over absent corporate defendants being called to answer for claims unconnected to the forum.

One protection of the Due Process clause is to "give[] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide*

(continued...)

Jurisdiction, 2001 U. CHI. LEGAL FORUM 119, 127 ("[T]he matter of whether forum-state sales subject the seller to general jurisdiction ... is a common fact scenario, yet no clear answer exists."); Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL FORUM 141, 158 (Noting among unanswered questions, the propriety of asserting "general jurisdiction over foreign multinational enterprises that sell large quantities of their products in the United States.").

[11] According to one commentator, as of 2001, forty-three states and the District of Columbia extend their extraterritorial personal jurisdiction to the "full extent" authorized by the Due Process Clause, while seven states (Connecticut, Florida, Illinois, Indiana, Ohio, Mississippi and New York) do not. *See* Jeffrey Untermohle, *Maryland's Diminished Long-Arm Jurisdiction in the Wake of Zavian v. Foudy*, 31 U. BALT. L. REV. 1, 11-13 nn. 68-69 (2001). Since 2001, Indiana has amended its long arm statute to coincide with the majority position. *See* Ind. Code § 34-8-2-2.

Volkswagen, 444 U.S. at 297. The growing circuit split outlined above makes it difficult for those in the business of selling goods in more than one jurisdiction to predict where they will be subject to suit. In a country where nearly all goods are marketed nationwide, and many are sold throughout the world, this means that a very large universe of potential defendants will be unable to predict where they may be held to answer for injuries that are essentially local to one jurisdiction.

As this Court has noted repeatedly, where a party systematically markets its product in a state, "it is not unreasonable to subject it to suit . . . if its allegedly defective merchandise has there been the source of injury to its owner or to others." *Id.* When a corporation "'purposefully avails itself of the privilege of conducting activities within the forum State,' *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *World-Wide Volkswagen*, 444 U.S. at 297. Put another way, since the connection between "the defendant, the forum, and the litigation" is the oft-cited justification for personal jurisdiction, *Shaffer*, 433 U.S. at 204, the reasonable expectation of the innumerable corporations that sell products throughout the nation is that they will be held to answer for a product-related harm in the forum where the particular product that caused the harm was sold.

There are substantial reasons to foreclose litigation in fora that lack any connection to the subject matter of the lawsuit. Congress has very recently highlighted the "mounting stack of evidence" of litigation abuses in plaintiff-friendly fora, "where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations)." S. REP. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5 (discussing the purposes of the Class Action Fairness Act). More generally, in recent

years, particular fora within the United States have become notorious for engaging in unfair and abusive practices. *See, e.g.*, Am. Tort Reform Found., *Judicial Hellholes 2005* at 8, *available at* http://www.atra.org/reports/hellholes/report.pdf (last visited May 26, 2006) (noting that, among other litigation abuses, judges in so-called "judicial hellholes . . . often do not stop forum-shopping, [and permit] personal injury lawyers [to] file cases there even if no connection to the jurisdiction exists"). And, as this case illustrates, the risk extends beyond having to defend lawsuits in the courts of one State based on conduct that occurred in one of the other 49 States. Suits on claims arising outside the United States—such as this one—are also in play.

It is also important to bear in mind that the due process rule at issue here does not just apply with regard to jurisdiction over American corporations. Under the panel decision below, plaintiffs will often be able to establish minimum contacts sufficient for general jurisdiction over foreign corporations.[12] If assertions of general jurisdiction over U.S. businesses based on sales activities offends *our* sense of fairness—because of the lack of connection between the defendant, the forum, and the litigation—it is truly

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[12] Satisfaction of the minimum contacts requirement, of course, does not necessarily mean that jurisdiction can be asserted over a particular foreign defendant consistent with due process. *Asahi*'s reasonableness analysis, focusing on the burden on the defendant, the forum's and plaintiff's interests, the judicial system's interest in efficient resolution of controversies, and the shared interests of the "'States in furthering fundamental substantive social policies,'" 480 U.S. at 113 (quoting *World-Wide Volkswagen*, 444 U.S. at 292), may yet lead to a conclusion, as in *Asahi*, that no such assertion would be reasonable. *Id.* at 116. But it is far from clear that this will commonly be true in the instance of large, multinational corporate defendants—of the type who typically sell products nationwide—since any "burden" may be deemed mitigated by the defendant's sheer size, and the fact that those corporations will otherwise be called upon to answer for injuries in the states where they occur. *See, e.g.*, *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129-30 (2d Cir. 2002).

anathema from the perspective of many foreign legal systems. *See, e.g.*, Juenger, *supra,* 2001 U. CHI. LEGAL FORUM at 155, 162 (describing general jurisdiction as the "rift that separates this country from all others"). Faced with uncertainty and the burdens articulated above, such businesses may even be "dissuaded" from coordinating sales efforts in the United States, thereby causing a "significant impact on [our] foreign trade relations." Brief of the Solicitor General as *Amicus Curiae* Supporting Petitioner at 1, 3, *Helicopteros*, 466 U.S. 408 (1984) (No. 82-1187) (urging this Court to "recognize the realities of today's sophisticated marketing practices," and restrict the scope of general jurisdiction).

Finally, a rule that permits States to exercise general jurisdiction over all companies that sell products and engage in sales-related activities within their boundaries undermines important federalism and comity interests protected by the Due Process Clause. As this Court has explained, constitutional limits on personal jurisdiction "act[] to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. It is important, "in the context of our federal system of government," *Int'l Shoe*, 326 U.S. at 317, to keep the States from exercising powers outside their respective spheres of interest. Put another way, this Court's personal jurisdiction jurisprudence recognizes that in a world of multiple sovereigns, not every sovereign will possess the requisite connections to "the defendant . . . and the litigation" in any given case. *Shaffer*, 433 U.S. at 204. But the rule adopted by the Ninth Circuit imperils that constitutional order by essentially obliterating State boundaries for a large class of defendants—namely, those national and international companies that market goods and services throughout the country. Under the Ninth Circuit rule, the only limitation on State court jurisdiction over disputes involving those kinds of companies is the plaintiff's choice

of where to file suit. That is a scheme sharply at odds with "our federal system of government." *Int'l Shoe*, 326 U.S. at 317.

III. The Court Should Grant Certiorari Now In Order To Prevent Extensive Wasteful Litigation

As this Court has recognized, "litigation over whether [a] case is in the right court is essentially a waste of time and resources." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) (internal quotation marks omitted). The cases discussed in Section I, *supra*, give some indication of the nature and extent of the judicial resources being invested in litigating the amenability of absent corporate plaintiffs to general jurisdiction. The Court's immediate intervention to resolve the conflict posed by this case would flesh out one important element of the "qualitative" nature of necessary minimum contacts where general jurisdiction is concerned—whether sales of products are the sort of actions that afford jurisdiction over a foreign corporation for all purposes. By announcing a "bright-line" jurisdictional rule in that respect, the Court could "ensure[] that judges and litigants will not waste their resources" in drawn out litigation over that issue. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., concurring in the judgment).

Litigation associated with efforts to assert general jurisdiction over corporations located elsewhere is particularly wasteful for a number of reasons. The experience of the lower courts, including in this case, is that determining general jurisdiction will often require extensive discovery on issues wholly irrelevant to the merits of the case.[13] In this case, for instance, the focus of discovery thus

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[13] *See, e.g.*, *Saudi v. Acomarit Maritimes Servs., S.A.*, 245 F. Supp. 2d 662, 670 (E.D. Pa. 2003) (acknowledging "extensive jurisdictional discovery" before denying general jurisdiction), *aff'd*, 114 F. App'x. 449 (3rd Cir. 2004), *cert. denied*, 544 U.S. 976 (2005); *Burns & Russell Co.*

far has been on activities that indisputably never affected Tuazon or his claim, such as Reynolds' warehouse lease, its local political activities, and the number and workplace of Reynolds' Washington employees. None of this effort advances the ball one inch toward a resolution of the merits of the case. And, as commentators have noted, the expense and uncertainty of jurisdictional disputes forces some defendants to acquiesce in an unconstitutional assertion of jurisdiction.[14]

Jurisdictional litigation is also particularly pernicious because it goes to the court's fundamental power to act, and thus often generates appeals and reversals. *See, e.g.*, *Asahi*, 480 U.S. 102; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros*, 466 U.S. 408; *World-Wide Volkswagen*, 444 U.S. 286; *Shaffer*, 433 U.S. 186; *Hanson*, 357 U.S. 235. The vast majority of decisions made by a trial court, such as those relating to discovery or evidence issues, are appealed only rarely because the decisions are committed to the trial court's discretion or subject to the harmless error doctrine. But jurisdictional questions are reviewed *de novo*, and an erroneous assertion of jurisdiction requires reversal of

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(continued...)

v. Oldcastle, Inc., 198 F. Supp. 2d 687, 689 (D. Md. 2004) (same); *Gonzalez v. Internacional de Elevadores, S.A.*, 891 A.2d 227, 230 (D.C. 2006) (same); *Schott Glas v. Adame*, 178 S.W.3d 307, 312 (Tex. App. 2005) (same).

[14] *See* Mary Twitchell, *Why We Keep Doing Business With Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL FORUM 171, 198-99 (observing that the "uncertainty and the expense of litigating jurisdiction" causes defendants to choose not to assert the defense, because while "[p]ersonal jurisdiction debate is a wonderful activity for the classroom, [it is] a timely and costly one for clients") (internal quotation marks omitted); Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe's Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 582 (1995) ("Judged by its internal costs, our current law of personal jurisdiction is a disaster.").

the entire proceeding. *See, e.g.*, *Helicopteros*, 466 U.S. 408 (effectively voiding a judgment entered after a jury trial).

In addition, litigation of jurisdictional issues in a state of legal uncertainty about whether contacts of a particular type can ever suffice to support a forum's authority is not only wasteful in its own right, but is a major obstacle to settlement of some disputes that might otherwise be amenable to settlement. Parties who see a substantial open question whether the trial court is even empowered to hear their case are unlikely to be in the frame of mind to work at compromising less cosmic disagreements that may be presented by the merits of the cases. *See* Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternate Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 369-71 (1988) (observing that settlement usually depends upon converging estimates of the case, which is discouraged by uncertain and unstable legal doctrine).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRADLEY S. KELLER
WILLIAM H. WALSH
BYRNES & KELLER, LLP
1000 Second Avenue,
38th Floor
Seattle, WA 98104
(206) 622-2000

DONALD B. AYER
(Counsel of Record)
ROBERT F. MCDERMOTT, JR.
PAUL S. RYERSON
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

May 30, 2006

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NILO D. TUAZON, Plaintiff – Appellee, v. R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, Defendant – Appellant.	No. 04-35618 D.C. No. CV-03-00929-MJP Western District of Washington, Seattle AMENDED ORDER Filed: March 10, 2006

Before: CUDAHY,* T.G. NELSON, and McKEOWN, Circuit Judges.

The order filed on March 7, 2006 is hereby amended to read as follows. The panel has voted to deny the petition for panel rehearing. Judge McKeown has voted to deny the petition for rehearing en banc and Judges Nelson and Cudahy so recommend.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

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* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NILO D. TUAZON, Plaintiff – Appellee, v. R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, Defendant – Appellant.	No. 04-35618 D.C. No. CV-03-00929-MJP Western District of Washington, Seattle ORDER Filed: March 7, 2006

Before: CUDAHY,* T.G. NELSON, and McKEOWN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

NILO D. TUAZON, Plaintiff-Appellee, v. R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, Defendant-Appellant.

No. 04-35618

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

October 18, 2005, Argued and Submitted, Seattle, Washington
January 11, 2006, Filed

Before: CUDAHY,* T.G. NELSON, and, McKEOWN Circuit Judges

McKEOWN, Circuit Judge:

This case calls for us to decide whether R.J. Reynolds Tobacco Company ("Reynolds"), a North Carolina-based corporation that has operated in Washington for more than half a century, may be sued in Washington for its alleged participation in a worldwide conspiracy to deny the addictive and harmful effects of smoking. Nilo D. Tuazon was diagnosed with a chronic lung disorder in 2003 in his native Philippines. The same year, Tuazon established residence in Washington state and brought suit against Reynolds for its alleged conduct that led to his current illness. Reynolds appeals the district court's denial of its motion to dismiss for lack of personal jurisdiction and on grounds of *forum non conveniens*.

BACKGROUND

Nilo D. Tuazon, who was born and lived in the Philippines, started smoking Salem cigarettes at age seventeen and smoked continually for more than forty years. Ten to fifteen years ago, Tuazon began to experience a

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* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

chronic cough that left him weak and dizzy, a condition he suspected was smoking-related. Drawing on his own background as a lawyer and businessman, Tuazon began researching cases brought against tobacco companies in the United States.

Tuazon was diagnosed with chronic obstructive pulmonary disorder in 2003. Later that year, he immigrated to the United States on a petition supported by his daughter, a U.S. citizen, and settled with cousins in Renton, Washington. Soon after his arrival, doctors confirmed his diagnosis. Tuazon's treatment continues under the supervision of doctors in the Seattle area.

Reynolds, originally incorporated in New Jersey in 1899, maintains its headquarters in North Carolina. Reynolds has been licensed to do business in Washington since 1940 but has no manufacturing or production facilities in the state. Since at least 1998, Reynolds has maintained an office and up to forty full-time employees in the state. This presence has allowed Reynolds to do substantial business in Washington. From 1998-2002, Reynolds enjoyed a privileged position in the Washington market; it sold between 2.5 and 3 million cigarettes to distributors in Washington annually, generating $ 145-240 million in net sales each year. Also during this period, Reynolds' market share in Washington was 29-31%, while its national market share was 23-24%. This dominant sales position resulted from a long history of targeting Washington consumers with marketing and advertising campaigns. Since at least 1949, Reynolds has advertised in purely local publications, including the Seattle Times, the Spokane Spokesman Review, and the Tacoma News-Tribune.

Over time, Reynolds' efforts in Washington expanded to include political activity, more extensive market analysis, and sponsored research at the University of Washington. By the 1970s and 80s, Reynolds was conducting sophisticated market research, including focus groups and direct telephone surveys of smokers in several Washington cities, and providing hundreds of thousands of dollars to the University

of Washington to support research into the health-related effects of smoking. In the 1990s, Reynolds organized local opposition to city and state legislation that would have banned or limited smoking and cigarette advertising. More recently, Reynolds identified Washington as a priority market and launched renewed efforts targeted at Washington consumers, spending more than $ 200,000 in local advertising and giving away more than 200,000 packs of free promotional cigarettes each year.

In addition to its domestic operations, Reynolds has been active overseas through a former affiliate, R.J. Reynolds International, Inc. In the Philippines, Reynolds licensed Fortune Tobacco International, Ltd. ("Fortune Tobacco") to distribute Reynolds brand cigarettes, including Tuazon's preferred brand, Salem.

Tuazon's complaint alleges that Reynolds participated in a global conspiracy to suppress information regarding the addictive and health-related effects of cigarettes. The litigation of similar claims has a long and well-known history in the United States over the past decade. *See, e.g., Strawser v. Atkins*, 290 F.3d 720, 725 (4th Cir. 2002) ("In the 1990s, nearly all the states sued major tobacco companies for harm arising from the deliberate concealment of the health risks posed by tobacco.").[1] Tuazon alleges that the conspiracy involving major tobacco companies originated in the United States and, by the 1970s, had moved abroad. Working through affiliates and subsidiaries, such as the Asian Tobacco Council, the Philippines Tobacco

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[1] As the Fourth Circuit noted in *Strawser*, the states and tobacco companies involved in each case varied. *See* 290 F.3d at 725 n. 2. It is not necessary to summarize the history of tobacco litigation here. Information on tobacco-related litigation and the master settlement agreement is made available by the National Association of Attorneys General, at *http://www.naag.org /backpages/naag/tobacco.* Reynolds also maintains a data-base on tobacco-related litigation at *http://www.rjrt.com/legal/litOverview.aspx.*

Institute, and Fortune Tobacco, Tuazon claims that Reynolds was able to suppress information regarding tobacco's addictive and corrosive health effects. As a result, Tuazon continued smoking for decades despite growing health problems and warnings from friends and family.

Reynolds moved to dismiss Tuazon's complaint for lack of personal jurisdiction and on grounds of *forum non conveniens*. The district court denied the motion and Reynolds now appeals. The district court certified the question for immediate appeal and we granted Reynolds permission to appeal the district court's order.

ANALYSIS

I. PERSONAL JURISDICTION

We review de novo a district court's decision to exercise personal jurisdiction. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002). Tuazon bears the burden of showing that jurisdiction is appropriate. *Id.* (citing *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990)). Where, as here, the decision was based on written submissions only, without an evidentiary hearing, Tuazon must only make a prima facie showing of facts that would support jurisdiction. *Id.* (citing *Caruth v. Int'l Psychoanalytical Ass'n*, 59 F.3d 126, 128 (9th Cir. 1995)).

Exercise of in personam jurisdiction over an out-of-state defendant is limited by the Due Process Clause of the Fourteenth Amendment. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984) (citing *Pennoyer v. Neff*, 95 U.S. 714 (1878)). The cornerstone of the due process inquiry is an analysis of the defendant's contacts with the selected forum. The famous *International Shoe* case requires "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

A court may exercise specific jurisdiction where the suit "arises out of" or is related to the defendant's contacts with

the forum and the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *see also Helicopteros*, 466 U.S. at 414 n. 8. In contrast, in a controversy unrelated to a defendant's contacts with the forum, a court may exercise general jurisdiction only where "continuous corporate operations within a state [are] thought so substantial and of such a nature as to justify suit against [the defendant] on causes of action arising from dealings entirely distinct from those activities." *International Shoe*, 326 U.S. at 318; *accord Helicopteros*, 466 U.S. at 414 n.9. The standard for general jurisdiction is high; contacts with a state must "approximate physical presence." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). Put another way, a defendant must not only step through the door, it must also "[sit] down and [make] itself at home." *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1125 (9th Cir. 2002).

The parties agree that Tuazon's claim arises from Reynolds' conduct outside of Washington. Consequently, we must decide whether Reynolds' contacts with Washington suffice to support the exercise of general jurisdiction. To this end, we follow a two-step process, asking first, whether Washington's jurisdictional statute confers jurisdiction over Reynolds, and second, whether the exercise of jurisdiction comports with federal due process requirements. *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 850 (9th Cir. 1993).

A. WASHINGTON'S JURISDICTION STATUTE

Washington courts apply the service of process statute, rather than the long-arm statute, to determine whether general jurisdiction applies. *Rev. Code Wash.* § 4.28.080(10). The statute confers general jurisdiction over a corporation that is "doing business" in the state. *Crose v. Volkswagenwerk AG*, 558 P.2d 764, 765-66 (Wash. 1977). A company is doing business in Washington when it participates continuously and substantially in the state's

markets. *Id.* at 766. The Washington Supreme Court has no rigid or formulaic test for determining when a company is "doing business" in Washington, and instead conducts a fact-intensive, case-by-case analysis. *Id.* at 767[2]

In *Crose* and more recent cases, Washington courts have set guideposts to aid our inquiry. Crose involved a products liability lawsuit filed by a Washington resident against Volkswagen, a German corporation, arising from an injury in California. Volkswagen did not sell its products directly to Washington consumers, but only to an Oregon distributor. Despite this attenuated relationship, the Washington Supreme Court held that there was general jurisdiction under 4.28.080(10) because Volkswagen generated substantial revenue from a "well-organized, fully-integrated worldwide chain of distribution." *Id.*

More recent cases have relied on other factors in finding substantial and continuous contacts. In *Hartley v. American Contract Bridge League,* 812 P.2d 109 (Wash. Ct. App. 1991), the defendant's contacts were deemed continuous and substantial where it sold and transported goods to support bridge tournaments it organized in Washington and collected fees and dues from Washington residents. *Id.* at 112. The defendant's contacts also met the standard in *Hein v. Taco Bell,* 803 P.2d 329 (Wash. Ct. App. 1991); the defendant had been registered to do business in Washington for more than twenty years, owned a chain of restaurants, and depended on

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[2] In broad terms, the *Crose* analysis looks to five factors, including: (1) the interest of the state in providing a forum for its residents, (2) the ease with which the plaintiff could access another jurisdiction, (3) the amount, kind, and continuity of activities by the defendant in the state, (4) the significance of the economic benefits flowing from the defendant's in-state activities, and (5) the foreseeability of injury resulting from the use of the defendant's products. *Crose,* 558 P.2d at 768; *see also Hartley v. American Contract Bridge League,* 812 P.2d at 109, 112-13 (Wash. Ct. App. 1991). Washington courts regularly consider only the third factor in determining whether to exercise general jurisdiction. *Id.* at 113.

local markets and government infrastructure to support its business. *Id.* at 330-31.

In contrast, where in-state activity is singular, passive, or collateral to a business's principal efforts, Washington courts have refused jurisdiction. For example, one court held that a company's limited efforts to solicit visits to Opryland (Tennessee), commission payments to Washington-based travel brokers, and occasional broadcasts of music were not "continuous and substantial" contacts sufficient to subject the defendant to general jurisdiction in Washington. *Banton v. Opryland U.S. A., Inc.*, 767 P.2d 584, 588-89 (Wash. Ct. App. 1989), *overruled on other grounds by Shute v. Carnival Cruise Lines*, 783 P.2d 78, 82 (Wash. 1989). In *Osborne v. Spokane*, the court found that deriving revenue from sales in Washington that accounted for less than 1% of the company's regional revenue was insufficient to justify the exercise of general jurisdiction over a Canadian insurance brokerage firm because that revenue was not accompanied by indicia of other systematic and continuous contacts. 738 P.2d 1072, 1074-75 (Wash. Ct. App. 1987), *rev'd on other grounds, Scott Fetzer Co. v. Weeks*, 786 P.2d 265, 267 (Wash. 1990).

Close cases exist, but this is not one of them. Taken together, Reynolds' activities are very close to those of the defendants in *Hartley* and *Hein*. Unlike the defendants in *Banton* and *Osborne*, Reynolds does not attract customers or generate revenue on the basis of limited or passive contacts. As in *Hartley* and *Hein*, Reynolds does business in Washington with a long-established presence that generates substantial revenue and reaches many in-state consumers.

We are not convinced by Reynolds' argument that its contacts in Washington were "continuous" but not "substantial." Reynolds has been licensed to do business in Washington for decades, maintains an office and a staff of permanent employees, advertises in purely local media, targets Washington consumers, and derives $ 145-240 million in annual revenues from sales in Washington. In short, we hold that Reynolds' activities in Washington

constitute "doing business" within the meaning of the Washington service of process statute.

B. DUE PROCESS ANALYSIS

Our inquiry does not end with the Washington statute. The *Due Process Clause* allows *in personam* jurisdiction to be exercised over a non-resident corporate defendant only if it has "certain minimum contacts" with the forum state such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Helicopteros*, 466 U.S. at 414 (citing *International Shoe*, 326 U.S. at 316). In applying this standard, we employ yet another familiar two-part test: whether Reynolds has sufficient contacts with Washington and whether the exercise of jurisdiction is reasonable in this case. *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102 (1987).

1. MINIMUM CONTACTS

In the context of general jurisdiction, minimum contacts exist where a defendant has "substantial" or "continuous and systematic" contacts with the forum state, even if the case is unrelated to those contacts. *Helicopteros*, 466 U.S. at 415. The reach of general jurisdiction is defined, in the first instance, by the Supreme Court's decisions in *Perkins v. Benguet Consol. Mining Co. et al.*, 342 U.S. 437 (1952), and in *Helicopteros*.

In *Perkins*, the Court sketched for the first time a vision of personal jurisdiction that did not arise from the occurrence of the cause of action in the forum state. *Id.* at 446 ("The instant case takes us one step further to a proceeding *in personam* to enforce a cause of action not arising out of the corporation's activities in the state of the forum") (quoting *International Shoe*, 326 U.S. at 318-19 ("There have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities")). During World War II, the president of a Philippine mining company established an office in Ohio during the Japanese

occupation of the Philippines. At his office-in-exile in Ohio, the president:

> kept company files and held directors' meetings in the office, carried on correspondence relating to the business, distributed salary checks drawn on two active Ohio bank accounts, engaged an Ohio bank to act as transfer agent, and supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines.

Helicopteros, 466 U.S. at 415 (citing *Perkins,* 342 U.S. at 438, 445). Applying the principles of *International Shoe*, the Supreme Court upheld the exercise of jurisdiction by an Ohio court in a cause of action unrelated to the mining company's activities there.

At the other end of the spectrum, the Court deemed the defendant's contacts insufficient to justify the exercise of general jurisdiction in *Helicopteros,* 460 U.S. at 418-19. Defendant Helicopteros faced a wrongful death suit in state court in Texas arising from a helicopter crash in Peru. Helicopteros's contacts with Texas consisted of one meeting in Houston by its president to discuss a contract, significant purchases of helicopters, spare parts and accessories, training sessions for pilots and managers, and limited banking activities over a seven-year period. *Id.* at 410-11. At the time of the lawsuit, the company had never:

> been authorized to do business in Texas ... had an agent for the service of process ... performed helicopter operations in Texas or sold any product that reached Texas, ... solicited business in Texas, ... signed any contract in Texas, ... had any employee based there, ... recruited an employee in Texas ... owned real or personal property in Texas ... maintained an office or establishment there ... maintained ... records

> in Texas and [had] no shareholders in that State.

Id. at 411. On these facts, the Court rejected the Texas Supreme Court's conclusion that Helicopteros had sufficient contacts with Texas, holding that "purchases and related trips, standing alone, are not a sufficient basis for a State's assertion of jurisdiction." *Id.* at 417.

Navigating the territory between *Perkins* and *Helicopteros* requires us to balance the facts of each case. *Cf. Kulko v. Super. Ct. of Cal.*, 436 U.S. 84, 92 (1978) ("The 'minimum contacts' test of *International Shoe* is not susceptible to mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."). In evaluating general jurisdiction, we have not developed a precise checklist or articulated a definitive litany of factors. We consider, among other factors, "whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there." *Bancroft & Masters*, 223 F.3d at 1086. It is the nature and extent of the contacts that determines whether they are "substantial" or "continuous and systematic." Longevity, continuity, volume, economic impact, physical presence, and integration into the state's regulatory or economic markets are among the indicia of such a presence.

Although courts have been understandably reluctant to exercise general jurisdiction, *cf. Amoco Egypt*, 1 F.3d at 851 n.3 (noting that "the Supreme Court has upheld general jurisdiction only once"), the requisite showing has been sustained in a number of cases. For example, the Federal Circuit held that the *Due Process Clause* was satisfied for purposes of general jurisdiction where a defendant employed multiple distributors in the state and generated millions of dollars in annual revenues from in-state sales. *LSI Indus. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1375 (Fed. Cir. 2000). In *Lakin v. Prudential Securities*, 348 F.3d 704 (8th Cir. 2003), the defendant was a federally-chartered savings bank

with its principal place of business in Georgia, but haled to court in Missouri to face claims arising from a multi-million dollar, multi-state fraud. The Eighth Circuit held that Georgia-based Prudential's contacts with Missouri were continuous and substantial based on the fact that its $ 10 million home-equity loan portfolio in the state implied multi-year lending relationships with "hundreds, if not thousands of Missouri residents." *Id.* at 709. Noting also that the home-equity market was central to Prudential's business, the court remanded for additional jurisdictional discovery. *Id.* at 709-710; *see also Provident Nat'l Bank v. Lehman Mgmt. Co.,* 819 F.2d 434, 438 (3d Cir. 1987) (holding general jurisdiction proper where the defendant had no property in Pennsylvania and conducted no advertising and only a small percentage of its business in the state, but "the nature of [defendant's] contacts with Pennsylvania ... was central to the conduct of its business.").

Yet another example of general jurisdiction is found in *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.,* 84 F.3d 560 (2d Cir. 1996). Over a four-year period, the defendant's contacts with Vermont, the forum state, included sales of $ 4 million, ongoing relationships with five authorized dealers for its products in the state, product support for its dealers, national advertising that reached Vermont, direct marketing to at least three Vermont firms, and more than one hundred visits by employees to Vermont. *Id.* at 570. The defendant owned no property in Vermont and did not control its authorized dealers there. *Id.* at 572.

The Second Circuit acknowledged that any one of these facts alone might have been an insufficient contact, but held that "when *taken together*, [the contacts] are sufficient to establish general jurisdiction." *Id.* at 570 (emphasis in original). The court nevertheless dismissed the case because jurisdiction would have been unreasonable where neither the plaintiff nor the defendant resided in Vermont, the state of Vermont had no discernable interest in the case, and the plaintiff's only interest in Vermont as a forum seemed to be a generous statute of limitations. *Id.* at 574. Tuazon's case

is strikingly different in terms of the reasonableness analysis, as noted below.

As this review of cases illustrates, determining whether a corporate defendant's contacts in a particular case are substantial and continuous turns on the "economic reality of the defendants' activities rather than a mechanical checklist."[3] *Gates Learjet Corp. v. Jensen,* 743 F.2d 1325, 1331 (9th Cir. 1984). Generally, an isolated contact with the forum state, among those identified in *Bancroft & Masters*, will not support general jurisdiction. *See, e.g., Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.,* 284 F.3d 1114, 1124-25 (9th Cir. 2002) (holding that there was no general jurisdiction where a defendant's only contacts with California amounted to sixteen shipments of rice sold through an independently employed sales agent); *Congoleum Corp. v. DLW Aktiengesellschaft,* 729 F.2d 1240, 1242 (9th Cir. 1984) (noting that "no court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert jurisdiction in an unrelated cause of action"); *Bancroft & Masters,* 223 F.3d at 1086 (concluding that "occasional, unsolicited sales of tournament tickets and merchandise to California residents" and maintenance of a small number of license agreements with California vendors was insufficient to support general jurisdiction).

Reynolds' contacts in Washington are perhaps less than the wartime "home away from home" involved in *Perkins*,

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[3] Although there is a lively academic debate about the contours of general jurisdiction, *see e.g.*, Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610 (1988); Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. Chi. Legal F. 119 (2001), the lower courts have hewed to the principles set out as bookends by the Supreme Court and filled in the middle ground through a case-by-case review of individualized circumstances. Although it may be frustrating to some commentators that no formula has emerged, the circumstances vary so widely that a mechanical application of factors and principles would be unprincipled.

yet far more substantial than the defendant's limited contacts with Texas in *Helicopteros*. In analyzing the breadth and depth of Reynolds' contacts with Washington, we begin by noting that Reynolds' sales in Washington are not limited or occasional. Reynolds has had a serious presence in Washington for more than a half-century and generates enormous revenues from Washington—hundreds of millions of dollars in annual net sales in recent years. *Cf. LSI Indus.*, 232 F.3d at 1374 (general jurisdiction exists where, among other factors, the defendant generated several millions of dollars in annual sales in the forum state); *Metropolitan Life Ins. Co.*, 84 F.3d at 570 (general jurisdiction appropriate where defendant sold nearly $ 4 million in products in the forum state over a four-year period).

Reynolds' long and successful operations are not accidental. The company did not hide in its North Carolina home, passively trickling a small supply of cigarettes to Washington. *See, e.g., Sandstrom v. Chemlawn Corp.*, 904 F.2d 83, 88 (1st Cir. 1990) (no substantial and continuous contacts where defendant's presence in forum state was limited to being licensed to do business and purchasing limited advertisements); *Consolidated Dev't Corp. v. Sherritt, Inc.*, 216 F. 3d 1286, 1292 (11th Cir. 2000) (no substantial and continuous contacts where defendant's presence in the United States was limited to capital market transactions, appointing an agent for service of process, and sales of products through a subsidiary). The magnitude of Reynolds' operations and sales in Washington reflects an undeniable presence in the state; it has held a license to do business there since 1940, has advertised in purely local publications since at least the 1950s, has engaged in local political activity to protect its market, and maintains a permanent office and workforce in the state. *Cf. Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790, 793 (10th Cir. 1979) (reversing the district court's dismissal for lack of general personal jurisdiction where the defendant had been licensed to do business in the forum state for almost forty years, had conducted sales and sales promotions, and had recently established a factory there).

Selling cigarettes is Reynolds' core business, in Washington and elsewhere. *Cf. Lakin,* 348 F.3d at 709; *Provident Nat'l Bank,* 819 F.2d at 438. Indeed, with the exception of incorporation, each factor identified in *Bancroft & Masters* is present in abundance. *See* 223 F.3d at 1086. It is also significant that the essence of Tuazon's complaint—a worldwide coverup regarding tobacco risks—cannot be characterized as "dealings entirely distinct" from Reynolds' business in Washington. *International Shoe,* 326 U.S. at 319. The tobacco litigation, in which Washington state was a major player, centered around some of these same allegations. Even after the global settlement, Reynolds participated in a court challenge in Washington involving state regulation of smoking. *See Aviation West Corp. v. Dep't of Labor and Indus.,* 138 Wn.2d 413, 980 P.2d 701 (Wash. 1999).

Reynolds urges that it is conducting business "with" Washington in some way that is meaningfully distinct from doing business "in" the state. Reynolds describes the former as "merely interacting with a limited number of customers or suppliers" in a state. *See Bancroft & Masters,* 223 F.3d at 1086 (holding that a company that "continues to have license agreements with two television networks and a handful of California vendors" was "doing business with California, but ... not ... doing business in California"). Although limited sales and licensing arrangements alone may be insufficient to establish general jurisdiction, Reynolds' decades long presence and its integration into Washington's markets can hardly be characterized as "mere" interaction with the state.

Finally, we are not persuaded by Reynolds' argument that affirming the district court would obliterate the distinction between general and specific jurisdiction. Although general jurisdiction is infrequently exercised, to conclude that it exists here does not mean that every case of failed specific jurisdiction will lead to the grant of general jurisdiction. The determination simply depends upon the nature and extent of the contacts. It is abundantly clear that a corporation does not necessarily submit to general

jurisdiction in every state in which it merely sells a product. But, jurisdiction here is not predicated on sales, or even the notion of substantial sales, alone. The minimum contacts are established by the confluence of Reynolds' physical, economic, and political presence and the company's myriad other activities in the state.

In short, we hold that Reynolds' continuous and substantial contacts are sufficient to support the exercise of general jurisdiction.

2. REASONABLENESS

In the second step of our inquiry, we determine whether the exercise of general jurisdiction in this case is reasonable.[4] Here, the burden is the defendant's to "'present a compelling case' that the exercise of jurisdiction would, in fact, be unreasonable." *Amoco Egypt,* 1 F.3d at 852; *accord Burger King,* 471 U.S. at 477. In accord with the Supreme Court's guidance in *Asahi*, we consider five factors: (1) the burden on the defendant, (2) the forum state's interest in the dispute, (3) the importance of the chosen forum to the plaintiff's interest in obtaining relief, (4) the most efficient forum for judicial resolution of the dispute, and (5) the "shared interest of the several States in furthering fundamental substantive social policies."[5] 480 U.S. at 113. Balancing these factors,

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[4] Reynolds objects that the district court did not recite the five *Asahi* factors, arguing that the consequences of this absence are "profound." We acknowledge Reynolds' concern but do not share its conclusion. The district court stated that the due process analysis did not end with minimum contacts and went on to discuss other factors generally recognized as reasonableness factors. It is also well-established that we may affirm a district court decision "on any basis supported by the record." *Amoco Egypt,* 1 F.3d at 851 n.3.

[5] The Ninth Circuit considers two other factors in assessing the reasonableness of jurisdiction: the extent of purposeful interjection and the existence of an alternative forum. *Amoco Egypt,* 1 F.3d at 851. The first factor is the extent of Reynolds' purposeful interjection into Washington. This inquiry "parallels the question of minimum contacts." *Id.* at 852. Because Reynolds has minimum contacts with Washington, this factor weighs in favor of jurisdiction. The second factor asks whether an adequate alternative forum exists for the resolution of the

we conclude that Reynolds has failed to meet its burden of demonstrating a compelling case of unreasonable jurisdiction. The exercise of jurisdiction here is reasonable and satisfies the requirements of the Due Process Clause.

We look first to the burden on the defendant of litigating in the chosen forum. Reynolds does not identify any specific hardship or otherwise comment on this factor, thus abdicating its burden on this point. Evaluation of this burden often contemplates a foreign, as in non-U.S., defendant haled to court in the United States. In such cases, "the unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi,* 480 U.S. at 114. Surely the burden on Reynolds of litigating in the Philippines would be, by degrees of magnitude, greater than litigating in Washington state. Reynolds does not suggest that the burden is one to be weighed between Washington and North Carolina. With its long history and substantial business in the state, litigating in Washington would not be an onerous burden for Reynolds. *Cf. Bancroft & Masters,* 223 F.3d at 1082 (determining jurisdiction to be reasonable when a Georgia corporation demonstrated no hardship in litigating in *California); Harris Rutsky & Co. Ins. Svcs. Inc. v. Bell & Clements Ltd.,* 328 F.3d 1122, 1132-33 (9th Cir. 2003) (observing that litigating in California posed only a limited burden to a London-based company, where its employees traveled there regularly for business).

(continued...)

dispute. This question is at the heart of the *forum non conveniens* analysis and is discussed in the next section. Although, as discussed below, Reynolds arguably has met its burden with respect to establishing the Philippines as an available alternative forum, this single factor would not trump the other factors so as to compel a different conclusion.

The second factor, a state's interest in providing a forum for its residents, weighs in favor of reasonableness. Tuazon lawfully immigrated to Washington and has taken up residence there; Washington rightfully takes an interest in his well-being and in this dispute. *See Dole Food,* 303 F.3d at 1116-17. Reynolds argues that Washington's interest is limited because Tuazon arrived with a fully mature claim resulting from conduct and harm entirely outside of Washington. Reynolds also impugns Tuazon's motives for moving to Washington, despite the long immigration process and the presence of his family in Washington. This argument begs the question—Tuazon now lives in Washington as a legal resident. Reynolds' theory not only ignores the fact of our mobile society but would create a novel jurisdictional hurdle by requiring the suit to be brought where the disease matures.

The third factor favors a forum that can provide convenient and effective relief for the plaintiff. It is easy for Tuazon to litigate his claim where he resides—Washington. The potential inconvenience of litigating in the Philippines (the only alternative that has been suggested) is mitigated by Tuazon's long history and deep connections with his country of origin. Although a plaintiff's choice of home forum is entitled to deference in a *forum non conveniens* analysis, *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 257 (1981), we are less deferential when determining reasonableness under personal jurisdiction. *Core-Vent Corp. v. Nobel Indus. AB,* 11 F.3d 1482, 1490 (9th Cir. 1993) ("A mere preference on the part of the plaintiff for its home forum does not affect the balancing"); *but see Asahi,* 480 U.S. at 114 ("When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant."). On the other hand, it is significant that Reynolds has not seriously argued that litigating in Washington is more of a burden than being in the Philippines. Thus, this factor is hardly a basis to support a finding of unreasonableness.

The fourth factor requires us to consider the most efficient judicial resolution for this case. "The site where the injury occurred and where evidence is located usually will be the most efficient forum." *Pacific Atl. Trading Co. v. M/V Main Express,* 758 F.2d 1325, 1331 (9th Cir. 1985). No clear winner emerges in this category, although we credit the district court's findings that, on balance, Washington state provides an efficient and viable forum to resolve Tuazon's claims. Even though Tuazon's injury occurred in the Philippines, his claim will require the presentation of evidence and testimony from far-flung regions, including Reynolds' headquarters in North Carolina and other sites where the alleged conspiracy was nurtured (such as New York), as well as Manila and perhaps other locales in the Philippines, and in Washington itself, where Tuazon has been treated by local doctors since his arrival in 2003. Resolving Tuazon's claims may require a court to apply the law of the Philippines to some or all of the substantive dispute. Admittedly, these factors may present some difficulties for a court in Washington, but it is not significantly easier for any other court to hear this case. For instance, it would not be a simple matter for a civil tribunal in the Philippines to exercise compulsory process upon Reynolds executives in North Carolina. It is neither impractical nor unreasonable for Washington to exercise jurisdiction.

The fifth factor calls for us to consider the shared interest of the several states in advancing social policy. While the "minimum-contacts analysis presupposes that two or more States may be interested in the outcome of a dispute," the conflict of one forum's interests with the "fundamental substantive social policies" of another state may usually be handled through choice-of-law analysis rather than rejecting jurisdiction. *Burger King,* 471 U.S. at 477, 483 n. 26. What is missing here is evidence of any real or purported conflict.

Reynolds struggles to cast this controversy as one implicating high diplomacy and the sovereignty of a foreign nation, arguing that the district court erred in failing to consider the interest of the Republic of the Philippines. True,

this factor often involves conflicts with the sovereignty of foreign nations, but usually when the foreign country is home to the defendant. *See e.g., Amoco Egypt,* 1 F.3d at 852 ("Where, as here, the defendant is from a foreign nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction."). Reynolds attempts to sidestep this distinction by arguing that it would be unfair to the Philippines to prevent Tuazon's case from being adjudicated there. Yet, it is Tuazon, a Philippine citizen, who decided to bring suit in the United States seeking personal damages from an alleged worldwide conspiracy. Contrary to Reynolds' assertions, it is difficult to see how an American court tramps on the sovereignty of the Philippines by exercising jurisdiction over an *American* company on a claim by an *American* resident.

From the standpoint of social policy, Washington has an interest in a suit involving an alleged coverup by a tobacco company. Not only is Tuazon a Washington resident, Washington was a key participant in the global tobacco settlement, which involved related health policy issues. This is not to say that the Philippines has no social policy interest in the issues raised by the suit. Nonetheless, a weighing of factors does not tip this factor in favor of the Philippines.

Taking the factors together, we have no difficulty concluding that the exercise of jurisdiction in Washington is reasonable.

II. FORUM NON CONVENIENS

Reynolds also sought relief on the basis of *forum non conveniens*. "A district court has discretion to decline to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for the parties." *Lueck v. Sundstrand Corp.,* 236 F.3d 1137, 1142 (9th Cir. 2001). In exercising this discretion, a court will consider whether an adequate alternate forum exists and whether the balance of public and private interests favors a different forum. *Id.*

Reynolds faces a doubly difficult task in appealing the district court's rejection of the *forum non conveniens* challenge. As an initial hurdle, the plaintiff's choice of

forum is entitled to deference.[6] *Piper Aircraft,* 454 U.S. at 257. And "where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Lueck,* 236 F.3d at 1143. We will reverse the district court's determination only where "there has been a clear abuse of discretion." *Id.*

A. ADEQUATE ALTERNATIVE FORUM

Reynolds bears the burden of demonstrating that an alternative forum exists and that it is adequate. *Jones v. GNC Franchising, Inc.,* 211 F.3d 495, 499 n. 22 (9th Cir. 2000). Generally, an alternative forum is available where the defendant is amenable to service of process and the forum provides "some remedy" for the wrong at issue. *Lueck,* 236 F.3d at 1143 (quoting *Piper Aircraft,* 454 U.S. at 254 n. 22). This test is easy to pass; typically, a forum will be inadequate only where the remedy provided is "so clearly inadequate or unsatisfactory, that it is no remedy at all." *Lockman Found. v. Evangelical Alliance Mission,* 930 F.2d 764, 768 (9th Cir. 1991) (quoting *Piper Aircraft,* 454 U.S. at 254).

The district court determined that Reynolds failed to show that the Philippines was an adequate alternative forum on two counts—failure to submit to service of process and failure to counter evidence of corruption in the Philippine court system. Before the district court, Reynolds sought primarily dismissal without conditions, but also argued in the

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[6] Reynolds' argument that Tuazon should not enjoy this deference because he is a foreign citizen is at odds with the Supreme Court's direction on this issue. In the context of *forum non conveniens* analysis, a resident alien such as Tuazon is entitled to the same deference as a citizen. *Piper Aircraft,* 454 U.S. at 256 n.23 ("Citizens *or residents* deserve somewhat more deference than foreign plaintiffs ...") (emphasis added). In assessing convenience, the distinction is between resident or citizen plaintiffs (Tuazon's category) and foreign plaintiffs. *Id.* Tuazon is not a "foreign" plaintiff.

alternative that if conditions were imposed, the court should not require waiver of "all defenses ... available ... at the time plaintiff originally filed this action." Although there may have been some ambiguity, purposeful or otherwise, in Reynolds' position, the acceptance of jurisdiction need not be absolute. A careful reading of the record confirms Reynolds' consent to service of process in the Philippines. A moving party does not forfeit its consent to service by seeking accommodations as part of the dismissal. With ample discretion to tailor any conditions of dismissal, the district court in this case could have done so. *See Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1450 (9th Cir. 1990) (holding the Philippines was an available forum where the district court granted a motion to dismiss "on the express condition that [defendant] consent to the jurisdiction of the Philippine courts"). Accordingly, we conclude that Reynolds established its voluntary submission to service of process.

The district court also found that Reynolds failed to bear its burden in establishing the Philippines as an adequate forum. This showing requires the defendant to establish that the foreign forum's laws provide potential redress for the injury alleged; the fact that the substantive law may be less favorable is relevant only if it would completely deprive plaintiffs of any remedy or would result in unfair treatment. *Piper Aircraft*, 454 U.S. at 255; *Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 701-02 (9th Cir. 1995).

To meet its burden, Reynolds offered an extensive affidavit by a former Justice of the Philippine Court of Appeals, detailing background about the Philippines and its court system, the availability of contract and tort relief, the discovery process, and procedural formalities. Under our precedent, this showing is sufficient. *Lueck*, 236 F.3d at 1143 (the district court, in deciding a *forum non conveniens* motion, is required to ask "whether [the alternative forum] offers a remedy for their losses").

In response, Tuazon argued that the Philippine courts are too corrupt and plagued with delays to provide an adequate

forum. Tuazon's assertions about the court system rest primarily on his own experience as a lawyer and businessman in the Philippines. He concedes that he prefers a U.S. court because damages in the Philippines are "niggardly," a ground that we have rejected in the *forum non conveniens* analysis. *Lueck*, 236 F.3d at 1144 (rejecting argument that lower damages would render a forum inadequate).

In his deposition, Tuazon referred to lengthy delays of up to thirty years in civil proceedings that would make any remedy essentially meaningless. *Cf. Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1228 (3d Cir. 1995) ("Wherever the line might be drawn separating tolerable delay from intolerable—that is, delay that does not vitiate a remedy and that which does—delays of up to a quarter of a century fall on the intolerable side of that line."). Notably, however, he failed to mention a single episode that he directly observed or of which he has personal knowledge. His corruption claims face the same evidentiary void. Indeed, it is difficult to square Tuazon's testimony about his satisfaction with the court system in several actions that he litigated in the Philippines, some all the way to the Supreme Court, with the general allegations in his brief about corruption. Tuazon's anecdotal evidence of corruption and delay provides insufficient basis for the district court's dramatic holding that the courts of the Philippines are an inadequate forum in this civil case.

With no personal testimony on corruption, Tuazon instead offers State Department Country Reports that reference corruption, judicial bias and inefficiency, and the potentially improper influence that corporate defendants wield over the judicial process. Without diminishing the gravity of such concerns, we note that the reports are focused on human rights in the Philippines, and the criminal justice system in particular. As with Tuazon's testimony on delay, such a general indictment provides insufficient substance to condemn the adequacy of Philippine courts in the face of the expert evidence offered by Reynolds.

A litigant asserting inadequacy or delay must make a powerful showing. *Cf. Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1084 (S. D. Fla. 1997) (noting that the argument that "the 'alternative forum is too corrupt to be adequate' ... does not enjoy a particularly impressive track record.") (collecting cases). A close reading of this case, relied on by both Tuazon and Reynolds, is instructive. The court held that corruption and delay in the Bolivian courts made a fair trial impossible. The proof offered was both specific and sordid, unlike the evidence here. The plaintiff offered statements by the Minister of Justice that Bolivian courts were instruments of extortion, detailed affidavits by two experts in Bolivian legal and political affairs, and an affidavit by a former legal counsel to the Bolivian legislature observing that "corruption is endemic to the judicial system of Bolivia." *Id.* at 1085. We are aware of only one other federal case to hold that an alternative forum was inadequate because of corruption. *See Bhatnagar*, 52 F.3d at 1226-27, 1235 (affirming the district court's determination that India was an inadequate forum and noting reliance on two expert affidavits stating that the Indian legal system was in "virtual collapse" and suffered delays of 15-20 years on average).

Indeed, in a particular case, the evidence may well support the conclusion that a legal system is so fraught with corruption, delay and bias as to provide "no remedy at all"; but the paltry evidence offered by Tuazon does not defeat Reynold's showing of adequacy.[7] In summary, this record does not support the district court's finding of inadequacy and we hold that Reynolds satisfied its burden to

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[7] In a long list of cases in this and other circuits, the Philippines has been found to be an adequate forum. *See, e.g., Contact Lumber*, 918 F.2d at 1450; *Cruz v. Maritime Company of the Philippines*, 549 F. Supp. 285, 289 (S.D.N.Y. 1982); *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 728 (5th Cir. 1990); *Transunion Corp. v. Pepsico, Inc.*, 640 F. Supp. 1211, 1216-20 (S. D.N.Y. 1986); *Cuevas v. Reading & Bates Corp.*, 577 F. Supp. 462, 476 (S. D. Tex. 1983); *Jose v. M/V Fir Grove*, 801 F. Supp. 349, 352-53 (D. Ore. 1991). Although these cases are not dispositive as to the evidence here, they are certainly illustrative.

demonstrate the existence of an adequate alternative forum in the Philippines.

B. THE BALANCE OF PUBLIC AND PRIVATE INTEREST FACTORS

Even when an adequate alternative forum exists, we will not disturb the plaintiff's original choice of forum "unless the 'private interest' and the 'public interest' factors strongly favor" dismissal. *Lueck,* 236 F.3d at 1146 (citing *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 509, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)). As we explained recently, a plaintiff need not select the optimal forum for his claim, but only a forum that is not so oppressive and vexatious to the defendant "as to be out of proportion to plaintiff's convenience." *Ravelo Monegro v. Rosa,* 211 F.3d 509, 514 (9th Cir. 2000) (reversing *forum non conveniens* dismissal, without discussing adequacy or availability of alternate forum, because the private interest factors weighed heavily against dismissal).[8] With this principle in mind, we turn to examine the weight of the private and public interest factors implicated by Tuazon's lawsuit.

Having already navigated several two-part tests and various multi-part tests in the jurisdictional analysis, we now

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[8] *See also Lony v. E.I. Du Pont de Nemours & Co.,* 935 F.2d 604, 608, 615 (3d Cir. 1991) (reversing the district court's *forum non conveniens* dismissal where Germany offered an adequate alternative forum, but the private and public interest factors, while "relatively close," were "not sufficient to overcome the strong ground for retention of jurisdiction"); *In re Ford Motor Co. and Bridgestone/Firestone North American Tire, LLC,* 344 F.3d 648, 652-53 (7th Cir. 2002) (on deferential mandamus review upholding denial of *forum non conveniens* motion where at least one alternative forum was adequate and the district court did not err in concluding that private and public interest factors favored venue in the *United States); SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.,* 382 F.3d 1097, 1100 n. 9, 1104 (11th Cir. 2004) (reversing *forum non conveniens* dismissal where the district court failed to grant proper deference to the plaintiff's choice of forum, even though the adequacy of Spain as an alternate forum was not at issue).

tackle a seven-part test to evaluate private interest factor considerations: (1) the residence of the parties and witnesses, (2) the forum's convenience to the litigants, (3) access to physical evidence and other sources of proof, (4) whether unwilling witnesses can be compelled to testify, (5) the cost of bringing witnesses to trial, (6) the enforceability of the judgment, (7) any practical problems or other factors that contribute to an efficient resolution. *Lueck,* 236 F.3d at 1145 (citing *Gulf Oil,* 330 U.S. at 508). In applying these factors, "the district court should look to any or all of the above factors which are relevant to the case before it, giving appropriate weight to each." *Id.* This guidance grants the district court the broadest possible discretion.

The district court found that dismissal was not warranted because "it is not more convenient to try the case in the Philippines" based on the private interest factors. Neither party is a resident of the Philippines; both reside in the United States. Most importantly, Tuazon is a resident of Washington, a more convenient forum for both sides than the Philippines. It is neither unimaginable nor unreasonable that Reynolds, having operated in the state for a half-century, should defend a lawsuit there.

The third and fourth private interest factors, concerning the location and availability of evidence and witnesses, present closer questions. Reynolds makes much of the lack of compulsory process to secure key witnesses and documents in the Philippines. In response, Tuazon argues that the bulk of evidence regarding the alleged conspiracy is likely in the United States. The crucial focus is not on "the number of witnesses or quantity of evidence in each locale," but rather "the materiality and importance of the anticipated [evidence and] witnesses' testimony and then determine[] their accessibility and convenience to the forum." *Lueck,* 236 F.3d at 1146 (quoting *Gates Learjet,* 743 F.2d at 1335-36).

As the district court observed, evidence will be drawn from both sides of the Pacific. Proof of Reynolds' participation in a global conspiracy likely will be in North Carolina and other United States locations. Proof of

Tuazon's medical condition is in Washington. Evidence of Tuazon's medical history and smoking habits, as well as Reynolds' activities in the Philippines and relationship with Fortune Tobacco, will be in the Philippines. Key witnesses from Reynolds and, of course, Tuazon himself, live in the United States.

Although the Philippines is not a party to the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, 20 U.S.T. 361 (1965), evidence there may be obtained through voluntary deposition or compelled by letters rogatory. *See* United States Department of State, Philippines Judicial Assistance, *available at* http://travel.state.gov/law/info/judicial/judicial_660.html. Also, Tuazon has offered to help Reynolds obtain documents personal to him that are located in the Philippines. Any court, whether in the United States or in the Philippines, will necessarily face some difficulty in securing evidence from abroad. The administrative challenges faced by the district court in Washington are not so great as to justify dismissal. Thus, the third and fourth factors weigh in favor of Washington.

On balance, the economics of bringing a few witnesses from the Philippines to Washington will be less costly than moving the trial apparatus, including both parties and witnesses, from all over the United States to the Philippines. Finally, the district court noted that no evidence had been presented about the enforceability of a Philippine judgment in the United States,[9] and that trial in the Philippines would face a lengthy delay. We agree with the district court that the combination of all of these factors counsels in favor of Washington, not the Philippines.

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[9] On appeal, Reynolds offered to satisfy any judgment in the Philippines. This offer was not before the district court and it comes too late to be factored into our analysis of the district court's exercise of its discretion.

In addition to the private interest factors, we must consider five public interest factors: (1) the local interest in the lawsuit, (2) the court's familiarity with the governing law, (3) the burden on local courts and juries, (4) congestion in the court, and (5) the costs of resolving a dispute unrelated to a particular forum. *Lueck,* 236 F.3d at 1147.

Reynolds makes much of the first factor, showing magnanimous concern that "an American jury—culturally and politically remote from the Philippines—should pass judgment on the social, political and economic issues that are implicated by plaintiff's claims." The backhanded indictment of the jury system is not compelling. Juries routinely address subjects that are totally foreign to them, ranging from the foreign language of patent disputes to cases involving foreign companies, foreign cultures and foreign languages. Tuazon resides in Washington, which has a strong interest in ensuring the welfare of its residents, U.S. citizens and non-citizens alike. *Piper Aircraft,* 454 U.S. at 257. No doubt the Philippines also has an interest in the alleged conspiracy and its effect on public health. This equipoise of interests favors neither jurisdiction. However, with this interest factor, we ask only if there is an identifiable local interest in the controversy, not whether another forum also has an interest.

The second public interest factor concerns the choice of law that will govern Tuazon's substantive claims. Both parties seem to believe that Philippine law will apply. We need not say now whether it does—the choice of law inquiry is better left to the district court. An analysis of Philippine law, assuming it applies, would be a burden and would support dismissal, as the district court acknowledged. This fact alone is not, however, determinative. *Piper Aircraft,* 454 U.S. at 260 n. 29 (holding that the need to apply foreign law "alone is not sufficient to warrant dismissal").

All the other public interest factors favor Washington as a forum. The district court noted it had the resources to hear Tuazon's case and "is not overburdened or congested." *Cf. Bhatnagar,* 52 F.3d at 1225 ("Given the incentives that press our district courts to reduce their caseload, we should take

particular care before second-guessing a district court that rejects a *forum non conveniens* motion after considering the factors that we and the Supreme Court have deemed relevant."). The district court also found that there will be no cost in resolving a case unrelated to the forum—the case is related to Washington because Tuazon resides there. Reynolds' briefing offers no comment on these three factors and nothing in the record supports reversal of the district court's determination that the public interest factors favor Washington. Reynolds has not met its burden to overcome Tuazon's choice of Washington as the forum for his lawsuit.

CONCLUSION

In this global and mobile age, we should expect to face controversies arising from activities originating in the United States but played out in distant lands. We should also expect to face more frequently difficult jurisdictional issues based on complicated cross-border factual scenarios. Nonetheless, Tuazon's claim represents an application of settled principles of personal jurisdiction. The debate over whether the public and private factors favor the Philippines or Washington as a forum is intensely fact-specific. Our role is not to second guess the district court's conclusions when the record supports its analysis of the *forum non conveniens* factors. The district court did not abuse its discretion in determining that these factors favored keeping the case in Washington.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NILO TUAZON, **Plaintiff,** **v.** **R.J. REYNOLDS TOBACCO CO., a foreign corporation,** **Defendant.**	**No. C03-0929P** ORDER GRANTING DEFENDANT'S MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

This matter comes before the Court on Defendant's Motion to Certify for interlocutory appeal this Court's March 17, 2004 Order Denying Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, *Forum Non Conveniens*, and International Comity. After considering the motion and all other relevant materials, Defendant's motion is hereby GRANTED.

Plaintiff does not oppose Defendant's motion, and a denial of certification in this case could result in an astounding waste of resources. Therefore, while this Court maintains confidence that its analysis was correct, Defendant's Motion to Certify Order for Interlocutory Appeal is hereby GRANTED. Consequently, this case is STAYED.

Dated: May 11, 2004.

/s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NILO TUAZON, **Plaintiff,** **v.** **R.J. REYNOLDS TOBACCO CO., a foreign corporation,** **Defendant.**	**No. C03-0929P** ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION, FORUM NON CONVENIENS, AND INTERNATIONAL COMITY

This matter comes before the Court on defendant's motion to dismiss for lack of personal jurisdiction, *forum non conveniens*, and international comity. After considering the motion and all other relevant materials, defendant's motion is hereby DENIED. Based on defendant's contacts with Washington, defendant is subject to general jurisdiction in Washington. Dismissal under *forum non conveniens* is not warranted because defendant has not agreed to submit to service of process and the Philippines is not an adequate forum. Lastly, international comity concerns do not favor dismissal.

Background

A. Procedural Facts

This suit alleges that defendant, R.J. Reynolds Tobacco Co. ("R.J. Reynolds"), was negligent for failing to warn its consumers about known dangers of its product. The plaintiff is a citizen of Washington, but his damages result from smoking while he lived in the Philippines. The plaintiff alleges that much of the wrongful conduct occurred in the United States. Defendant now moves to dismiss for lack of

personal jurisdiction, *forum non conveniens*, and international comity.

B. Defendant's Contacts with Washington

The defendant, R.J. Reynolds, has been continuously licensed to do business in Washington since 1940. (Ferguson Decl. Ex. 4). The defendant has leased an office in Redmond and employed about 45 full-time employees in Washington continuously since at least 1998. (*Id.* at Ex. 3, Interrog. 5-6). R.J. Reynolds currently controls more than 30% of the market share of cigarette sales in Washington. (*Id.* at Ex. 3, Interrog. 8(c)). From 1998 to 2002, the defendant paid approximately $7.96 million in taxes to the State of Washington. (*Id.* at Ex. 3, Interrog. 7). Over that same period, the defendant sold approximately 125 million packs of cigarettes in Washington and had net sales in Washington of almost $1 billion. (*Id.* at Ex. 3, Interrog. 8(a)-(b)). Additionally, in 2001 alone, R.J. Reynolds gave away 228,696 packs of cigarettes as part of a sampling program in Washington. (*Id.* at Ex. 4).

For advertising, the defendant has consistently identified Seattle as a "key market" or "emphasis market." *Id.* For example, in promoting its KAMEL brand in 1998, R.J. Reynolds identified Seattle as one of four priority markets. *Id.* In 1999, the defendant spent more than $202,238 for advertising in the following Seattle periodicals: *Seattle Gay News, Seattle Rocket, Seattle Stranger,* and *Seattle Weekly. Id.*

Analysis

A. Personal Jurisdiction

Due process requirements are met when in personam jurisdiction is asserted over a nonresident defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The relationship between the defendant and the forum must be such that it is reasonable to require the defendant corporation to defend the

suit in that forum. *Id.* at 317. There are two forms of personal jurisdiction. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). The first is general jurisdiction, in which the plaintiff's claims do not necessarily arise out of the defendant's contacts. *Id.* at 414 n.9. The second is specific jurisdiction, in which the plaintiff's claims must arise out of the defendant's contacts with the forum. *Id.* at 414 n.8. Here, the plaintiff does not contend that the defendant is subject to specific jurisdiction. Rather, the plaintiff asserts that this Court has general jurisdiction over R.J. Reynolds.

Whether personal jurisdiction exists is determined according to the law of the state where the court sits. *Core-Vent Corp. v. Nobel Industries, AB*, 11 F.3d 1482, 1484 (9th Cir. 1993). RCW 4.28.080(10) confers general jurisdiction over a nonresident defendant corporation that is "doing business" in Washington. *Crose v. Volkswagenwerk Aktiengellschaft*, 88 Wn.2d 50, 54, 558 P.2d 764 (1977). The Court in *Crose* identified the following five factors to determine whether the nonresident corporation is "doing business" in Washington: (1) the interest of the state in providing a forum for its residents; (2) the ease with which the plaintiff could gain access to another forum; (3) the amount, kind, and continuity of activities carried on by the foreign corporation in the state of Washington; (4) the significance of the economic benefits accruing to the foreign corporation as a result of activities purposely conducted in the state of Washington; and (5) the foreseeability of injury resulting from the use of the foreign corporation's product. *Id.* at 57.

However, for general jurisdiction, the only relevant factor is the third—the amount, kind, and continuity of activities carried on by the foreign corporation in the state of Washington—because the other factors address due process concerns unique to specific jurisdiction. *Hein v. Taco Bell*, 60 Wn. App. 325, 330, 803 P.2d 329 (1991) (ruling that the third factor is the only relevant one, but the court continued to discuss the others nonetheless). *See also Raymond v. Robinson*, 104 Wn. App. 627, 15 P.3d 697 (2001).

Nonetheless, this Court is constrained by Crose to discuss the other factors to determine whether the defendant's due process rights are violated. 88 Wn.2d at 57. *See also Hartley v. American Contract Bridge League*, 61 Wn. App. 600, 812 P.2d 109 (1991) (expressing confidence that only the third factor is relevant, but constrained by *Crose* and *Hein* to discuss the other factors).

(1) Amount, Kind, and Continuity of Activities

In cases where courts have upheld general jurisdiction in Washington, the most influential factors were how long the corporation had been licensed to do business in Washington, whether it owned or leased property in Washington, whether it had employees in the forum, and whether it targeted residents of the forum. *Hein*, 60 Wn. App. at 330-31; *Hartley*, 61 Wn. App. at 608. In *Hein*, the defendant was registered to do business in Washington for twenty-four years. 60 Wn. App. at 330. It owned sixteen restaurants in the Seattle area and employed numerous residents. *Id.* at 330-31. The defendant purchased supplies and goods in the forum and benefited from local and state fire and police protection. *Id.* at 331.

Similarly, in *Hartley*, the court found that the defendant's contacts were continuous and substantial and upheld general jurisdiction. 61 Wn. App. at 610. In that case, the defendant, a bridge players' organization, published a magazine for its members, which included Washington residents. *Id.* at 606. The defendant collected fees and dues from Washington residents. *Id.* It organized tournaments in the forum: transporting supplies and goods to them and determining which residents could participate in them. *Id.* Also, the defendant sold bridge paraphernalia to Washington residents. *Id.*

In cases where the courts have found no general jurisdiction, the defendants did not have offices or employees in Washington and were not registered to do business in Washington. *Raymond*, 104 Wn. App. at 635. *See also MBM Fisheries, Inc. v. Bollinger Machine Shop and Shipyard, Inc.*, 60 Wn. App. 414, 420, 804 P.2d 627 (1991);

Banton v. Opryland U.S.A., Inc., 53 Wn. App. 409, 417-18, 767 P.2d 584 (1989).

The court in *Raymond* acknowledged that it was a close case, but nonetheless, held that the defendant was not subject to general jurisdiction. 104 Wn. App. at 636. The defendant's contacts included the following: (1) placing advertisements in four national magazines that reach Washington consumers; (2) contacting approximately 150 Washington consumers; (3) negotiating terms with Washington consumers; (4) selling approximately ten percent of its slide-out units to Washington consumers; (5) assembling a list of past customers residing in Washington and distributing this list to potential customers in Washington; (6) authorizing warranty repairs in Washington; (7) sending a technician to Washington to service the plaintiff's slide-out unit; and (8) orally extending the plaintiff's warranty while the plaintiff was in Washington. *Id.* These contacts were insufficient for the following reasons: (1) the defendant did not direct its advertising to particular Washington residents; (2) it did not participate in nor organize any events in Washington; (3) it did not initiate contact with any Washington consumers; (4) it did not buy, sell, or distribute any products in the forum; (5) it was not a registered foreign corporation in Washington; (6) it had no employees in the forum; and (7) it did not benefit from police and fire protection services. *Id.* at 635-36.

In this case, the contacts exceed those of the defendant in *Raymond*. In contrast, they are similar to those in *Hein* and *Hartley*. The defendant, R.J. Reynolds, has been licensed to do business in Washington for 64 years, has an office in the forum, employs several residents of the forum, controls 30% of the market share in the forum, and consistently targets Washington residents as members of a key or emphasis market. *See Hein*, 60 Wn. App. at 330-31; *Hartley*, 61 Wn. App. at 606. Additionally, the defendant benefits from the local and state fire and police protection because it has an office and employees in the forum. *See Hein*, 60 Wn. App. at 331. R.J. Reynolds is doing business in Washington; and therefore, is subject to general jurisdiction in Washington.

Because Washington courts are constrained by *Crose* and *Hein*, this Court must analyze the other factors to determine whether the defendant's due process rights are violated.

(2) Interest of Washington in Providing a Forum

Washington has an interest in providing a forum for its citizens. *See Hartley*, 61 Wn. App. at 608. The plaintiff, Mr. Tuazon, is a citizen of Washington. Therefore, this factor weighs in favor of general jurisdiction.

(3) Ease of Gaining access to Another Forum

Although this factor confuses general jurisdiction with *forum non conveniens*, it favors the plaintiff. The defendants have not successfully rebutted the plaintiff's argument that the defendant is not subject to service of process in the alternative forum, the Philippines. No other alternative forum has been proposed. Therefore, there is no alternative forum available to which access can be gained. Thus, this factor weighs in favor of general jurisdiction.

(4) Significance of Economic Benefit as a Result of Activities Conducted in the Forum

The defendant receives an enormous economic benefit from its activities in Washington. The defendant's net sales approximate $183.8 million a year and $963.3 million over a five year period. (Ferguson Decl. Ex. 3, Interrog. 8). Based on these numbers alone, the defendant receives a significant economic benefit as a result of its activities in Washington. Therefore, this factor favors general jurisdiction.

(5) The Foreseeability that the Defendant will be Hauled into Court in Washington

In *Hein*, the court stated that foreseeability exists when the defendant has conducted extensive business activities in the forum. 60 Wn. App. at 331. Here, it is foreseeable that the defendant will be hauled into court in Washington because defendant has conducted extensive business activities in Washington, as outlined above.

This Court has general jurisdiction over the defendant. First, the defendant, through its extensive contacts in Washington, is doing business in Washington. Second, the

remaining factors do not violate the defendant's due process rights because they favor general jurisdiction.

B. Forum Non Conveniens.

A district court may dismiss a case under *forum non conveniens* when an alternative forum would be more convenient for the parties. *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001). In a motion to dismiss for *forum non conveniens*, the defendant must prove (1) an adequate and available alternative forum exists and (2) the private and public interest factors favor dismissal. *Id.* Courts must also make a choice of law determination, but in this case, both parties agree that the law of the Philippines applies. *See Id.* at 1143. A citizen plaintiff's choice of forum is entitled to great deference because a showing of convenience by a party who has sued in his or her home forum will typically outweigh the inconvenience shown by the defendant. *Id.*; *Contact Lumber Co. v. P.T. Moges Shipping Co., Ltd.*, 918 F.2d 1446, 1449 (9th Cir. 1990).

(1) The Philippines is Not an Adequate or Available Alternative Forum

An alternative forum ordinarily exists when the defendant is amenable to service of process in the foreign forum. *Lueck*, 236 F.3d at 1143. A defendant is amenable to service of process in the foreign forum when it establishes that it is subject to personal jurisdiction or agrees not to contest personal jurisdiction in the alternative forum. *See Direct Color Services, Inc. v. Eastman Kodak Co.*, 929 S.W.2d 558, 564 (Tex. App. 1996). The doctrine of *forum non conveniens* presupposes that there are at least two forums in which the defendant is amenable to service of process. *Myers v. The Boeing Co.*, 115 Wn.2d 123, 128, 794 P.2d 1272 (1990). R.J. Reynolds has not indicated that it is amenable to service of process in the Philippines, the only proposed alternative. Thus, the defendant has not proven that the proposed alternative forum is available. This Court is concerned with the possibility that the defendant may not be subject to service in the Philippines, in which case the plaintiff will not have an available forum if this case is

dismissed. This omission is fatal, and defendant's motion to dismiss for *forum non conveniens* cannot be granted.

Even if the defendant had submitted to service of process in the Philippines, the defendant failed to prove that it is an adequate forum. In rare circumstances, where the remedy offered by the alternative forum is clearly unsatisfactory, that forum may not be adequate. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22 (1981). The defendant has the burden of establishing that the alternative forum is adequate. *Contact Lumber*, 918 F.2d 1446 (9th Cir. 1990).

Defendant cited to several cases in which the court determined that the Philippines was an adequate forum. (Def.'s Mot. to Dismiss at 10, p.14 n.7). However, in those cases, the plaintiffs presented minimal evidence to suggest that the Philippine court system was inadequate. *See e.g., Contact Lumber*, 918 F.2d at 1450 (plaintiff argued with limited support that litigation in the Philippines is time consuming and that collections are problematic, but the district court required the defendant to issue a letter of guaranty providing that the defendant would satisfy any judgment rendered by a Philippine court); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995) (court found the Philippines adequate because its laws provided a remedy, but did not discuss corruption). Because the results of these cases depended on the evidence brought by the parties, the fact that they found the Philippines as an adequate forum merely indicates that the defendant provided sufficient evidence to counter the plaintiff's evidence or the plaintiff did not present sufficient evidence to raise the issue of corruption. It does not establish that the Philippines is always an adequate forum.

In contrast to the cases cited by the defendant, the plaintiff in this case has presented compelling evidence that the Philippines is not an adequate forum. The Country Report on Human Rights Practices for the Philippines published by the United States Department of State discusses various inadequacies in the Philippine judicial system. (*See* Ferguson Decl. Ex. 52 ("Country Report")); *Canales*

Martinez v. Dow Chemical Co., 219 F. Supp 2d 719, 740-41 (E.D. La. 2002) (finding the forum inadequate based on corruption and improper relationships between judges and litigants as reported in the 2001 Country Report on Human Rights Practices for the Philippines). The judicial system of the Philippines continues to suffer from corruption, often failing to provide due process and equal justice, which has left citizens with the belief that official justice is beyond reach. (Country Report at Intro.). The report states the following:

> The Constitution provides for an independent judiciary; however, the judicial system suffered from corruption and inefficiency. Personal ties, and sometimes venality, undermined the commitment of some government employees to ensure due process and equal justice. The result was impunity for some wealthy and influential offenders, and widespread skepticism that the judicial process would produce fair outcomes.
>
> Low pay rendered both judges and prosecutors susceptible to corruption. There were many allegations that judges accepted money and other bribes. Legal experts inside and outside the justice system criticized relationships between some judges and individual corporate litigants. Some lawyers acted as "case fixers," gaining the favor of judges and other court officials and allegedly bribing some witnesses.

Id. at Sec.1(e)). A judicial system that is susceptible to bribery, inefficiency, and other forms of corruption, particularly in favor of wealthy and influential litigants is not an adequate forum. This is especially true given the fact that Defendant R.J. Reynolds is wealthy and likely influential. R.J. Reynolds also allegedly has a long-standing business relationship with a large powerful Philippine corporation,

Fortune Tobacco. The plaintiff adequately raised the issue that there is serious corruption such that the plaintiff is at risk of being denied basic rights and fairness.

The defendant in its reply fails to address the issue of corruption. In the defendant's motion, it submitted an affidavit from an expert on Philippine law, which indicates that the plaintiff's claims could be tried in the Philippines, but it was silent on the issue of corruption. (Def.'s Mot. Ex. 4). Thus, the defendant has not met its ultimate burden to prove that the facts established by the plaintiff are otherwise. In conclusion, even if R.J. Reynolds had submitted to personal jurisdiction in the Philippines, the defendant failed to establish that the Philippines is an adequate forum.

(2) The Private and Public Interest Factors Do Not Favor Dismissal

A plaintiff's choice of forum is rarely disturbed unless the private and public interest factors strongly favor trial in a foreign country. *Lueck*, 236 F.3d at 1145. A court may look to any or all of the factors in weighing the private and public interests. *Id.*

Courts consider the following seven private interest factors in a *forum non conveniens* analysis: (1) the residence of the parties and witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to testify; (6) the enforceability of the judgment; and (7) all other practical problems that make a trial of a case easy, expeditious and inexpensive. *Id.*

First, the parties are all residents of the United States. Further, most of the witnesses appear to be residents of the United States. While there are a few witnesses, including the plaintiff's friends and a few doctors, who reside in the Philippines, the plaintiff's treating physicians and family, who are also potential witnesses, reside in Washington. Additionally, most of the R.J. Reynolds employees who may be called as witnesses reside in the United States.

Second, Washington is a convenient forum for the parties because the plaintiff is a citizen of the forum. Additionally, Washington seems to be less burdensome for the defendant than the Philippines because the defendant has extensive contacts with Washington.

Third, the defendant does not contend that there are any barriers to accessing documents that would not exist if the case were filed in the Philippines. The fact that there are relevant documents in a foreign country is not enough of a burden to justify dismissal. Furthermore, plaintiff has offered to facilitate defendant's access to physical evidence related to the plaintiff that may be located in the Philippines. (Pltf.'s Mot. for Lim. Juris. Disc. And Resp. to Def.'s Mot. to Dismiss at p.21).

Fourth, the defendant does not contest plaintiff's argument that unwilling witnesses can be compelled to testify through Letters Rogatory transmitted through diplomatic channels, which provides a transcript of testimony that is admissible in court. (*See* Decl. Ferguson, Ex. 53, p.2).

Fifth, the plaintiff argues that the Philippines witnesses can testify by Letters Rogatory. R.J. Reynolds does not contend that testimony by transcript is insufficient. Even if the defendant did, bringing the few necessary witnesses to Washington is probably less burdensome than requiring all the parties and potential American witnesses to travel to the Philippines. Defendant's conclusory argument that witnesses may be beyond this Court's compulsory process is without support.

Sixth, we have no evidence to determine whether a Philippine judgment would be enforceable against an American defendant.

Seventh, the Philippine court system presents the practical problem of inevitable delays. According to the United States Department of State, there is a shortage of judges, with thirty-two percent of trial court judgeships vacant, and long delays in trials are common. (Ferguson Decl. Ex. 52. Intro., Sec. 1(e)).

Based on the private interests of the parties, it is not more convenient to try the case in the Philippines. Therefore, the private interest factors do not favor dismissal of the plaintiff's claims.

Courts consider the following five public interest factors in a *forum non conveniens* analysis: (1) local interest in the lawsuit; (2) the court's familiarity with governing law; (3) burden on local courts and juries; (4) congestion in the court; and (5) the costs of resolving a dispute unrelated to this forum. *Lueck*, 236 F.3d at 1147.

First, Washington has an interest in providing a forum for its citizens. Second, although applying Philippine law is a burden to any court unfamiliar with those laws, particular because access to those laws is limited, this factor is not dispositive. Third, this Court is not overburdened or congested. Fourth, the plaintiff's claim is related to the forum because he is a citizen of Washington, his health care is provided locally, and the plaintiff's community is impacted by the loss of productivity caused by the defendant's alleged wrongdoing. Thus, there is no cost in resolving a dispute unrelated to this forum. The public interest factors do not favor dismissal for *forum non conveniens*, especially when the plaintiff's choice of forum is entitled to deference.

In sum, the Philippines is not a more convenient forum than Washington. The defendant has not submitted to jurisdiction in the Philippines. Moreover, the defendant has not established that the Philippines is an adequate forum. In contrast, it is corrupt and subject to bribery and inequity. Lastly, the public and private interest factors do not favor dismissal.

C. International Comity.

The court has discretion to dismiss based on the principles of international comity. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). International comity is the "recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation." *Id.* There must be a "true conflict between domestic and foreign law"

to warrant dismissal based on international comity. *In re Simon*, 153 F.3d 991, 999 (9th Cir. 1998). In this case, the defendant has not pointed to a single conflict between the law of the Philippines and the law of the United States. Furthermore, it is undisputed that Philippine law applies to this suit. Thus, international comity does not apply to this case.

Conclusion

In conclusion, the defendant's motion to dismiss for lack of personal jurisdiction, *forum non conveniens*, and international comity is hereby DENIED. First, the defendant is subject to general jurisdiction because it is registered to do business in Washington, has an office in Washington, employs numerous residents, controls 30% of the cigarette market in Washington, and targets Seattle as a key or emphasis market. Second, the case should not be dismissed under *forum non conveniens* because the defendant did not submit to personal jurisdiction in the alternative forum, and the alternative forum is subject to corruption such that the plaintiff is at risk of being denied basic rights and fairness. Also, the private and public interests do not suggest that it would be more convenient to bring the suit in the Philippines. Third, international comity does not apply to this case because the defendant cannot identify a conflict of law between the Philippines and the United States. Defendant's motion is hereby DENIED.

The parties are directed to submit a joint status report within 15 days from issuance of this order.

Dated: March 17, 2004.

/s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

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No. 05-1525

IN THE
Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY, PETITIONER

v.

NILO D. TUAZON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DEEPAK GUPTA
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

PETER K. STRIS
RADHA A. PATHAK
WHITTIER LAW SCHOOL
3333 Harbor Boulevard
Costa Mesa, CA 92626
(714) 444-4141

JEAN-CLAUDE ANDRÉ
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Avenue
Los Angeles, CA 90034
(310) 558-0932

SHAUN P. MARTIN
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW
5998 Alcalá Park
San Diego, CA 92110
(619) 260-2347

November 2006

QUESTION PRESENTED

Whether a court's exercise of general jurisdiction offends due process where the defendant's contacts with the forum state include a permanent physical office and workforce of 45 full-time employees; extensive political activity in the state, including organizing local opposition to proposed city and state regulation; funding of medical research; advertising in purely local publications; substantial in-state business, including $145-240 million in annual net sales and a nearly one-third market share; and a license to do business in the state for over 60 years.

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RESPONDENT'S BRIEF IN OPPOSITION

The fact-bound interlocutory ruling below—that the exercise of general jurisdiction over petitioner R.J. Reynolds in Washington State does not offend due process—was based on the combination of *all* of Reynolds' in-state activities, including its physical and political contacts, and not only its sales activities. "It is abundantly clear," the court of appeals explained, "that a corporation does not necessarily submit to general jurisdiction in every state in which it merely sells a product. But, jurisdiction here is not predicated on sales, or even the notion of substantial sales, alone. The minimum contacts are established by the confluence of Reynolds' physical, economic, and political presence and the company's myriad of other activities in the state." Pet. App. 16a-17a.

Reynolds' petition, however, is premised on a distinction between "sales-related activities," which Reynolds contends are never sufficient to support general jurisdiction, and activities that are "unrelated to sales." Pet. 12. The petition urges the Court to "announce[] a 'bright-line' jurisdictional rule" that a defendant's activities, no matter how extensive, will always be insufficient if they happen to relate to sales. *Id.* at 23. Reynolds never argued for such a categorical rule in the court below, and the question presented is therefore not properly preserved for review by this Court. Moreover, because the court of appeals' decision was expressly based in part on Reynolds' non-sales contacts with Washington, the question whether sales alone may support general jurisdiction is not even implicated by this case.

In an attempt to make the question presented fit the facts, Reynolds employs a nebulous term, "sales-related activities," that apparently encompasses everything from sporadic sales or purchases in the forum state to the wide-ranging combination of contacts at issue here: a permanent office and workforce of

45 full-time employees; substantial political activity at both the state and local level; the funding of medical research; advertising in purely local publications; hundreds of millions of dollars in annual revenue; a nearly one-third share of the local market; and a continuous license to do business in the state for over 60 years. Terminology aside, the bottom line is that Reynolds can point to no appellate decision, state or federal, that has either rejected general jurisdiction on the basis of contacts as substantial and continuous as these or embraced the bright-line rule that Reynolds advocates.

There is no conflict concerning the question presented. All that remains, therefore, is Reynolds' disappointment with the court of appeals' eminently sensible application of the settled law of personal jurisdiction to the particular facts demonstrating Reynolds' presence in Washington State. This Court should deny the petition.

STATEMENT

1. R.J. Reynolds' Contacts with Washington State. R.J. Reynolds manufactures and markets cigarettes worldwide. Reynolds is incorporated and has its principal place of business in North Carolina, and its cigarettes are manufactured at Reynolds' facilities in Tobaccoville, North Carolina, and Winston-Salem, North Carolina. Pet. App. 4a; CA9 Excerpts of Record (ER) 10.

Reynolds has had a continuous presence in Washington State for over half a century and has been licensed to do business there since 1940. Pet. App. 4a. Since at least 1949, Reynolds has advertised in local publications, including the *Seattle Times*, the *Spokane Spokesman Review*, and the *Tacoma News-Tribune*. *Id.* The district court found that Reynolds has

consistently identified Seattle, Washington, as a "key market" or "emphasis market." *Id.* at 33a. For example, in promoting its Camel brand in 1998, Reynolds identified Seattle as one of only four priority markets. *Id.* Since 1998, Reynolds' marketing activities in Washington have been subject to a consent agreement with Washington's Attorney General—part of a global settlement between the tobacco companies and the states—that prohibits practices such as the use of cartoon characters in cigarette packaging and paid endorsements in movies or live concerts. ER 73-74. Even after the global settlement, Reynolds participated in a court challenge in Washington involving state regulation of smoking, Pet. App. 16a (citing *Aviation West Corp. v. Dep't of Labor & Indus.*, 980 P.2d 701 (Wash. 1999)), and Reynolds has both initiated and defended numerous actions in the Washington state and federal courts.[1]

Reynolds maintains a permanent physical presence in the state. Since at least 1998, the company has maintained an office in Redmond, Washington, and a workforce of as many as 45 full-time employees dedicated to promoting its business in the state. *Id.* at 33a. In addition, Reynolds uses warehouse facilities in Washington State to store and facilitate distribution of its products. ER 11.

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[1] *See, e.g., Regence Blueshield v. Philip Morris Inc.*, 5 Fed. Appx. 651 (CA9 2001); *Ass'n of Washington Pub. Hosp. Districts v. Philip Morris Inc.*, 241 F.3d 696 (CA9 2001); *R.J. Reynolds Tobacco Co. v. McKenna*, 445 F. Supp. 2d 1252 (W.D. Wash. 2006); *Kimball ex rel. Kimball v. RJ Reynolds Tobacco Co.*, No. C03-664JLR, 2006 WL 1148506 (W.D. Wash. April 26, 2006); *Northwest Laborers-Employers Health & Sec. Trust Fund v. Philip Morris, Inc.*, 58 F. Supp. 2d 1211 (W.D. Wash. 1999).

Reynolds' activities in Washington State also go well beyond standard business activities. In the 1990s, Reynolds organized local opposition to city and state legislation that would have banned or limited smoking and cigarette advertising. Pet. App. 5a. For instance, in 1997, when the Seattle-King County Board of Health was considering proposals to restrict indoor and outdoor advertising of tobacco products, including self-service store displays, Reynolds distributed bulletins to Washington businesses describing the proposals as a "misguided attempt at reducing access to youth tobacco," and urged retailers and "smokers' rights groups" to "speak out" against them. Supp. ER 1:142-45. Since the 1970s, Reynolds has also funded medical research at the University of Washington about the health-related effects of smoking. *Id.* at 1:164.

In both absolute and relative terms, Reynolds' business in the State of Washington is substantial. Reynolds has a nearly one-third share of the Washington market, significantly better than its national market share of approximately 23%. Pet. App. 4a. From 1998 through 2002, Reynolds sold between 2.5 and 3 million cigarettes in Washington annually, achieving annual net sales of $145-240 million. *Id.* at 4a, 33a. Over that same time period, Reynolds paid approximately $7.96 million in taxes to the State of Washington, including "property use, cigarette excise, corporate income and franchise taxes." *Id.*; ER at 11.

2. Proceedings Below. Respondent Nilo Tuazon was diagnosed with chronic obstructive pulmonary disorder in 2003 after smoking Salem cigarettes, which are marketed worldwide by Reynolds, for more than forty years. Pet. App. 4a. After moving to Washington State from the Philippines, Mr. Tuazon sued Reynolds in the U.S. District Court for the District of

Washington, alleging that Reynolds participated in a global conspiracy to suppress information regarding the addictive and health-related effects of cigarettes. *Id.* at 5a. Jurisdiction over Reynolds was premised on the corporation's extensive contacts with the state.

Reynolds filed a motion to dismiss the suit based on lack of personal jurisdiction and forum non conveniens. The district court denied the motion. Reynolds sought and obtained permission to pursue an interlocutory appeal. The court of appeals, in a unanimous decision, affirmed on both grounds. Because the forum non conveniens issue is not presented in the petition, that issue is not further addressed here.

The court of appeals began by reiterating that "[t]he standard for general jurisdiction is high; contacts with a state must 'approximate physical presence.'" *Id.* at 7a (quoting *Bancroft & Masters, Inc. v. August Nat'l Inc.*, 223 F.3d 1082, 1086 (CA9 2000)). The court of appeals also recognized that "[n]avigating the territory" of this Court's general jurisdiction jurisprudence "requires * * * balanc[ing] the facts of each case." *Id.* at 12a (citing *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 92 (1978)). In concluding that Reynolds' contacts with Washington were sufficient to justify general jurisdiction under the state jurisdiction statute, which requires that a defendant "participate[] continuously and substantially in the state's markets," *id.* at 7a-8a, the court observed that "[c]lose cases exist, but this is not one of them," *id.* at 9a.

Turning to the due process "minimum contacts" analysis, the court offered a thorough survey of the case law and a discussion of the "breadth and depth of Reynolds' contacts with Washington." *Id.* at 15a. Because Reynolds did not advocate a categorical rule barring sales or sales-related activities from

the minimum contacts analysis, the court neither rejected nor adopted such a rule. Indeed, in dicta, the court speculated that "limited sales and licensing arrangements alone may be insufficient to establish jurisdiction" and observed that "a corporation does not necessarily submit to general jurisdiction in every state in which it merely sells a product." *Id.* at 16a. The court instead found general jurisdiction based on the combination of Reynolds' contacts with Washington, including its physical presence, its political activity, its long history in the state, its local advertising, and other activities. *Id.* at 10a-17a. It made clear that "jurisdiction here is not predicated on sales, or even the notion of substantial sales, alone. The minimum contacts are established by the confluence of Reynolds' physical, economic, and political presence and the company's myriad of other activities in the state." *Id.* at 16a-17a. The court also concluded that the exercise of jurisdiction was reasonable—a holding that Reynolds does not contest here—because, among other things, Reynolds had "not identif[ied] any specific hardship" to it of litigating in Washington. *Id.* at 18a.

Reynolds sought rehearing en banc. No judge on the court of appeals requested a vote on whether to hear the matter en banc, and the petition was denied. *Id.* at 1a.

REASONS FOR DENYING THE WRIT

I. The Question Presented Was Neither Raised Nor Decided Below.

Reynolds asks this Court to grant certiorari to decide whether "sales-related activities" in the forum state may ever constitute sufficient minimum contacts to support general jurisdiction. Reynolds urges the Court to "announce[] a

'bright-line' jurisdictional rule" that a corporation's activities, no matter how extensive, will always be insufficient if those activities happen to be related to sales. Pet. 23. But Reynolds did not raise this issue in the court of appeals and, accordingly, it is not properly before this Court. *See TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) ("We do not reach this issue because it was not raised or briefed below."). The court of appeals, moreover, did not pass on the question and, in fact, even speculated in dicta that "sales and licensing arrangements alone may be insufficient to establish jurisdiction." Pet. App. 16a; *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

Instead of advocating the novel bright-line rule that it now seeks, Reynolds simply argued in the court of appeals, based on existing law, that "its activities in Washington are not so substantial and of such a nature as to justify suit against it on unrelated causes of action." Pet. CA9 Opening Br. at 11. To be sure, Reynolds contended that general jurisdiction is not justified "merely because a defendant's products are routinely sold" in the forum or because of "sales personnel located in the forum state." *Id.* at 15-16. But nowhere did Reynolds ask the court of appeals to adopt a categorical rule placing any activity that might be regarded as "sales-related"—including even political activity—outside the purview of the minimum contacts analysis altogether. *See United States v. United Foods*, 533 U.S. 405, 417 (2001) (declining "to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." (citations omitted)). Far from advocating a categorical rule, Reynolds acknowledged in its reply brief to the court of appeals that "the Supreme Court has emphasized time and again that the

test for personal jurisdiction is not a mechanical one, but rather demands a case by case examination of whether the exercise of jurisdiction is reasonable." Pet. CA9 Reply Br. at 9. Tellingly, the term "sales-related activities"—a term that Reynolds now uses to lump together a sweeping range of corporate activity—never appeared in any of Reynolds' merits briefs in the court of appeals.

II. There Is No Conflict Over the Question Whether "Sales-Related Activities" May Support General Jurisdiction.

In an attempt to manufacture a conflict, the petition places a large range jurisdictional of contacts under the vague label of "sales-related activities" and contends that there is a "substantial and growing split in the federal circuits on the question whether such sales-related activities in the forum State are sufficient minimum contacts to support general jurisdiction." Pet. 18. There is no split.

The petition never defines "sales-related activities," but, as used by Reynolds, the term apparently encompasses everything from an individual musician's "sporadic concert performances" and "sales of records," *Madara v. Hall*, 916 F.2d 1510, 1516 n.7 (CA11 1990) (cited at Pet. 14), to Reynolds' permanent in-state office and workforce, extensive in-state political activity, and funding for medical research (Pet. App. 4a, 15a). In this manner, Reynolds improperly characterizes cases involving defendants with few jurisdictional contacts as falling on one side of a "split," when in reality, those cases simply represent one end of a continuum that flows from this Court's personal jurisdiction jurisprudence, which depends on the substantiality, frequency, and permanence of the defendant's contacts with the forum state. Thus, the only thing that accounts for the different

outcomes in these cases is their very different facts. No court of appeals has rejected general jurisdiction where the contacts are as substantial as they are here.

Moreover, none of the cases cited by the petition adopted the bright-line rule that Reynolds seeks in its petition. To the contrary, these cases all take the same basic approach as the decision below: They weigh the various contacts—including, for example, such sales-related contacts as whether the defendant has a physical salesroom or sales office, the level of advertising, a license to do business in the state, the number of employees and their sales-related duties, and the payment of sales taxes—and compare them to the contacts in prior cases.

The First and Fourth Circuit cases cited in the petition (at 12-13) were all suits against drug manufacturers in which those courts found general jurisdiction inappropriate based on the manufacturers' very minimal promotional activities in the forum states. In *Glater v. Eli Lilly & Co.*, 744 F.2d 213 (CA1 1984), the First Circuit rejected general jurisdiction because the defendant had no offices in New Hampshire, was not registered to do business in New Hampshire, had only "limited advertising" in professional trade journals that circulated in New Hampshire, and had only three nonexclusive sales representatives who lived in New Hampshire. *Id.* at 214-15. Moreover, the court noted that "[n]either the sales representatives nor Lilly directly sells products in New Hampshire; rather sales are made to wholesale distributors." *Id.* at 215. In *Seymour v. Parke Davis & Co.*, 423 F.2d 584 (CA1 1970), on which *Glater* relied, the First Circuit reached the same conclusion on nearly identical facts:

> The defendant * * * maintains no office or salesroom [in New Hampshire]. It has no

> bank account, is not registered to do business, has designated no agent to receive process, and has engaged in no litigation except the present. Its nearest regional office is in Massachusetts.

Id. at 584.

The Fourth Circuit cases are no different. In *Nichols v. GD Searle & Co.*, 991 F.2d 1195 (CA4 1993), the court found general jurisdiction in Maryland inappropriate because the defendant "ha[d] never maintained an office in Maryland" and its "only activity in the state in the years prior to these suits" was that it employed representatives to promote its products; sales orders, however, "were not placed through them but were made directly through the company." *Id.* at 1198. And in *Ratliff v. Cooper Labs*, 444 F.2d 745 (CA4 1971), the court rejected general jurisdiction in South Carolina over two drug companies, one of whose "activities in South Carolina [were] limited to solicitation by mail," while the other employed only five representatives whose primary duties in South Carolina were "the promotion of drugs, not the actual sale of them." *Id.* at 746. Rather than adopt a categorical rule excluding such contacts because they were sales-related, the court stressed that "[n]either [defendant] maintains an office in South Carolina, and neither warehouses goods there * * * * Nor does either maintain a bank account in the state or advertise in directories there (although advertisements do appear in national medical journals which subsequently find their way into the state)." *Id.* at 748 (relying on *Seymour*, "a case of remarkable similarity to the one before us.").

Notably, each of these First and Fourth Circuit cases emphasized the lack of contacts that are present here—an in-

state office or warehouse, a license to do business in the state, purely local advertising, direct sales by in-state representatives—activities that Reynolds seeks to place under the umbrella of "sales-related" contacts. These cases thus provide no support for Reynolds' categorical rule.

The "sales-related" contacts in the Fifth and Eleventh Circuit cases cited in the petition were even less significant. In one, the Fifth Circuit rejected general jurisdiction in Texas over Beech Aircraft because "Beech has never qualified to do business nor maintained an agent for service of process in Texas. Beech has no telephone listing in Texas; it has no warehouse or manufacturing facilities and has never had a bank account in Texas, nor has it insured any person in Texas; it owns no real estate in Texas; it has not paid taxes to the State of Texas; it has no employees or directors who are permanently assigned to work in Texas." *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 372 (CA5 1987). In another, the Fifth Circuit emphasized the isolated nature of the defendant's sales activities rather than the fact that they were related to sales. *See Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 218 (CA5 2000) (the evidence "show[ed], at best, that [the defendant] sold, on isolated occasions, products to entities located in Texas, that it was party to an agreement to provide Mexican mines with products that were shipped to Texas before being shipped to Mexico, that companies used [the defendant's] products for projects in Texas, and that [the defendant's] personnel made field service visits to Texas between December 1992 and December 1993."). In *Madara*, the Eleventh Circuit held that a New York musician's "sporadic concert performances" and "sales of records" in Florida were insufficient to support general jurisdiction over a libel action, 916 F.2d at 1516 n.7, and in *Associated Transp. Line, Inc. v. Productos Fitosanitarios Proficol El Carmen, SA*, 197 F.3d

1070, 1075 (CA11 1999), it held that a Colombian herbicide manufacturer's "nine sales to the United States during a four-year period" were not "constitutionally sufficient to support general jurisdiction."

Such isolated contacts pale in comparison to Reynolds' contacts with Washington and refute Reynolds' claim that those courts would have decided this case differently. More importantly, each of the cases supposedly supporting the claimed conflict all emphasized the absence of sales-related contacts that are present in this case and made clear that the *extent* of the defendants' sales activities was relevant to the jurisdictional analysis. Both points are inconsistent with Reynolds' categorical rule and demonstrate that no court has given the question whether certain contacts may or may not be characterized as "sales-related activities" dispositive significance in assessing whether a court has general jurisdiction.

Because there is no conflict over the question presented, the petition should be denied.

III. The Rule That Reynolds Advocates Is Unsupported By This Court's Cases and Would Be Unworkable In Practice.

1. Due process is satisfied when personal jurisdiction is asserted over a nonresident corporate defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Intn'l Shoe v. Washington*, 326 U.S. 310, 316 (1945). When the particular controversy before the court does not arise out of the corporation's activities in the forum state, due process requires that the defendant's

"continuous corporate operations within a state [be] thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Id.* at 318.

The twin guideposts for determining whether general jurisdiction satisfies constitutional limits remain this Court's decisions in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), and *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984). In *Perkins*, a Philippine corporation "ha[d] been carrying on in Ohio a continuous and systematic, but limited, part of its general business"—essentially running a kind of office-in-exile in Ohio—such that the exercise of general jurisdiction by an Ohio court was deemed "reasonable and just." 342 U.S. at 438. In *Helicopteros*, by contrast, the Court concluded that a Colombian corporation's contacts with Texas—purchases of helicopters combined with other isolated contacts—were insufficient to justify general jurisdiction where the corporation had never "been authorized to do business in Texas * * * sold any product that reached Texas * * * signed any contract in Texas * * * had any employee based there * * * [or] maintained an office or establishment there." 466 U.S. at 411.

As the decision below explained, in cases that fall between these guideposts, courts must consider whether the contacts discussed in *Helicopteros* and *Perkins* are present and, to determine whether the contacts are "substantial" or "continuous and systematic," must assess their longevity, continuity, volume, and economic impact, and the defendant's physical presence in the state. Pet. App. 12a. The lower courts adhere "to the principles set out as bookends by the Supreme Court" and "fill[] in the middle ground through a case-by-case review," based on comparison with other cases. *Id.* at 14a n.3; *see also*

Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil 3d* § 1067.4 (2002) (citing a "wealth of illustrative cases" on general jurisdiction and explaining that the circuits uniformly require that "the defendant must be engaged in longstanding business in the forum state, such as marketing or shipping products, or performing services or maintaining one or more offices there; activities that are less extensive than that will not qualify for general in personam jurisdiction.").

2. Although Reynolds purports to identify a split in authority in the application of these guideposts, the real thrust of Reynolds' petition is a thinly-veiled attack on this Court's time-honored general jurisdiction jurisprudence. The petition argues, for instance, that "[t]here are substantial reasons to foreclose litigation in fora that lack any connection to the subject matter of the lawsuit," Pet. at 20, and decries the consequences of a doctrine under which corporations that "engage in a systematic and ongoing array of advertising, marketing, and distribution activities" may be subject to suit in jurisdictions in which those activities occur, *id.* at 6; *see also id.* at 7 (criticizing decisions finding general jurisdiction as "contrary to the common practice in our courts, under which litigation is most commonly brought in the jurisdiction in which the harm occurs.").

But this Court's cases support neither the categorical rule that Reynolds seeks nor its broad-based attack on the doctrine of general jurisdiction. To the contrary, the Court has made clear that "[t]he victim of any * * * tort, may choose to bring suit in *any* forum with which the defendant has" the requisite minimum contacts. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780-81 (1984) (emphasis added). Reynolds' attempt to identify support for its "sales-related" contacts exception in this

Court's modern personal jurisdiction jurisprudence is thus unavailing. *See* Pet. at 10 (citing *Keeton* and *Helicopteros*). In *Keeton*, the defendant's *only* contacts with the forum were monthly sales of 10,000 to 15,000 magazines. 465 U.S. at 779 & n.11. The Court speculated that these contacts "may not be so substantial as to support" general jurisdiction, but did not suggest a per se rule excluding sales or sales-related contacts. The most natural reading of this statement is that the contacts were simply insufficient as a matter of degree, not as a matter of kind. And in *Helicopteros*, the defendant had made *no* sales in the forum state, a fact that the Court emphasized in finding that general jurisdiction was unwarranted. 466 U.S. at 411. Because these decisions treated the quantum of sales as a factor in the general jurisdiction analysis, if anything, they undermine, rather than support, Reynolds' case for a per se exception for "sales-related" contacts. It should not be surprising, therefore, that no lower court has embraced such a rule.

More broadly, this Court has repeatedly emphasized that "talismanic jurisdiction formulas" and "clear-cut jurisdictional rules" are ill-suited to the minimum contacts analysis. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485-86 & n.29 (1985). "The 'minimum contacts' test * * * is not susceptible to mechanical application; rather the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present * * * * [T]his determination is one in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.'" *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 92 (1978) (internal quotations omitted). Reynolds' insistence on a bright-line rule with respect to "sales-related activities" cannot be reconciled with these statements.

3. Particularly because Reynolds failed to raise the question presented in the courts below and because no court has adopted its position, it is unclear precisely what rule Reynolds seeks and how that rule might apply to the facts of this case. At some points in its petition, Reynolds appears to advocate a sweeping rule that would exempt any activity other than manufacturing or corporate management from the general jurisdiction minimum contacts analysis. *See* Pet. 6, 12. Under such a rule, Reynolds would apparently be subject to general jurisdiction only in the courts of North Carolina. It is also unclear how such a rule would operate in suits against other types of defendants—such as large retailers—whose business consists almost entirely of sales. In such cases, general jurisdiction could apparently only be established in the states in which those businesses are headquartered. With respect to both manufacturing corporations and retailers, then, an expansive version of Reynolds' rule would all but scrap the doctrine of general jurisdiction.

At other points in the petition, however, Reynolds appears to ask this Court to grant review to decide a narrower question: "whether sales of a product are the sort of actions that afford jurisdiction over a foreign corporation for all purposes." *Id.* at 23. But if that is the question presented, then it is not presented in this case at all because the court of appeals' decision was expressly based on contacts other than sales alone, Reynolds' contacts extend well beyond sales, and the answer to the question would not affect the outcome of the case.

As this case illustrates, Reynolds' categorical rule, however formulated, would create uncertainties and obstacles in cases in which the alleged injury—such as the health effects of a particular product or exposure to a chemical—is one that may develop over time. A plaintiff like Mr. Tuazon, who is a

resident of Washington State but whose disease matured while he was elsewhere, would have no real choice but to file his suit in North Carolina or in the state where the injury arose. But for people who have used a dangerous product such as Reynolds' over a long period of time and have moved from one state to another, it may be unclear where the injury arose. In these circumstances, precluding a plaintiff from filing suit in a state in which the defendant has continuous and substantial sales-related contacts—and where the exercise of jurisdiction is thus both foreseeable and poses no hardship to the defendant—would create needless satellite litigation over where the injury arose. As the decision below observed, Reynolds "ignores the fact of our mobile society." Pet. App. 19a.[2]

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[2] The petition, without saying so explicitly, suggests (at 2) that Mr. Tuazon may have moved to the United States to sue Reynolds. *See also* Pet. App. 19a (observing that Reynolds "impugns Tuazon's motives for moving to Washington, despite the long immigration process and the presence of his family in Washington."). Mr. Tuazon's residence, however, is irrelevant. Indeed, for due process purposes—which concerns the fairness of the forum for the *defendant*—this Court has already made clear that a plaintiff need not have any contact with the forum state, and Washington would thus have been a proper forum even had Mr. Tuazon continued to reside in the Philippines. *See Keeton*, 465 U.S. at 779-80 ("[W]e have not to date required a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking."). To be sure, the plaintiff's residence is "not completely irrelevant to the jurisdictional inquiry," but that is only because the plaintiff's residence may in some cases "*enhance* defendant's contacts with the forum." *Id.* at 780 (emphasis added). In any event, "Reynolds does not identify any specific hardship" it suffers from litigating in

(continued...)

Reynolds' rule would also inevitably lead to litigation and uncertainty about another issue: whether a particular defendant's activities are properly characterized "sales-related." This case offers a good illustration. The court below found general jurisdiction based not only on Reynolds' sales activities, but also on such factors as the company's extensive political and lobbying activity and its funding of medical research. Yet Reynolds apparently views all of these contacts as "sales-related activities."

Although litigation concerning jurisdictional questions can be wasteful and create uncertainty, as Reynolds acknowledges (at 24-25), those facts strongly counsel in favor of denying the petition. Reynolds advocates a thoroughly untested categorical rule, the contours of which are unclear and which, if adopted, would work a radical change in the American law of personal jurisdiction. A change of this magnitude would be guaranteed to disrupt the settled expectations of businesses, parties to contracts, and consumers. Before this Court entertains such a path-breaking proposal, the lower courts should be given an adequate and meaningful opportunity to test it. And because no court has adopted the bright-line rule that Reynolds seeks or considered contacts as substantial as Reynolds' contacts in this case, the lower courts have not been given that opportunity. This Court's intervention would, therefore, be unwarranted.

* * * * *

(...continued)
Washington, Pet. App. 18a, which is not surprising given its repeated appearance in Washington's state and federal courts, *see supra* note 1, and "has not seriously argued that litigating in Washington is more of a burden than being in the Philippines," Pet. App. 19a.

Even assuming some need to clarify aspects of the law of general jurisdiction, this case offers a particularly poor vehicle for doing so. Because Reynolds did not preserve its position below, because the question presented is not implicated by the facts of this case, and because the lower courts are not in conflict, review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DEEPAK GUPTA
BRIAN WOLFMAN
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

PETER K. STRIS
RADHA A. PATHAK
WHITTIER LAW SCHOOL
3333 Harbor Boulevard
Costa Mesa, CA 92626
(714) 444-4141

JEAN-CLAUDE ANDRÉ
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Avenue
Los Angeles, CA 90034
(310) 558-0932

SHAUN P. MARTIN
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
5998 Alcalá Park
San Diego, CA 92110
(619) 260-2347

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(3)

No. 05-1525

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,

Petitioner,

v.

NILO D. TUAZON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

BRADLEY S. KELLER
BYRNES & KELLER, LLP
1000 Second Avenue,
38th Floor
Seattle, WA 98104
(206) 622-2000

DONALD B. AYER
(Counsel of Record)
ROBERT F. MCDERMOTT, JR.
PAUL S. RYERSON
JONATHAN B. BERMAN
CHARLES T. KOTUBY, JR.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

November 15, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether product sales and sales-related activities in the forum state can constitute sufficient minimum contacts to support the exercise of general jurisdiction over a company incorporated and headquartered elsewhere, and thus allow suit on claims having no connection to the forum.

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The Petition for Certiorari demonstrated that there is a substantial disagreement among the circuits with regard to how to determine the sufficiency of minimum contacts to support general jurisdiction. It showed further that this difference in approach has, since this Court's last decision on the subject in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), resulted in a series of decisions from at least nine circuits, and from many states, which sharply divide on the question whether product sales and related activities can suffice to support general jurisdiction.

In addition, the Petition demonstrated that the constitutional due process issue at hand, on its face a question of fair play and substantial justice, also directly implicates important issues of federalism and forum shopping. And it has become a font of extensive wasteful litigation about whether a case is in the right court, which can only be significantly reduced by this Court's clarification of the proper approach to the issue.

Respondent does not dispute the importance of the issue at hand; its recurrent nature; its close relationship to fundamental questions of fairness, federalism and forum shopping; or that questions of general jurisdiction have become a subject of frequent, extended, wasteful litigation. Indeed, he appears to "assum[e] some need to clarify aspects of the law of general jurisdiction." Opp. at 19. But he urges the Court to deny certiorari for two reasons.

First, he asserts, without basis, that the issue framed in the Question Presented was not raised in or decided by the Court below. Second, as to the circuit conflict, he asserts that the cases relied on by Petitioner can all be reconciled on their facts, and that "these cases all take the same basic approach as the decision below, . . . weigh[ing] the various contacts . . . and compar[ing] them to the contacts in prior cases." *Id.* at 9. In essence, he echoes the reasoning of the court below, in viewing this Court's decisions in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) and *Helicopteros* as "bookends," with space between them that must be "filled

in" by unstructured, "case-by-case review." Opp. at 13 (quoting Pet. App. 14a n.3).

But the circuit cases are not reconcilable on their facts. And the undeniably divergent results flow directly from a fundamental difference in approach to the analysis. As demonstrated in the Petition and below, a growing number of circuits now view general jurisdiction as turning on a largely quantitative assessment of undifferentiated facts, with the result that companies selling large quantities of products may well be susceptible to general jurisdiction everywhere their products are sold. This is sharply at odds with the more traditional approach, which focuses more on the quality than the quantity of contacts, *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945), and recognizes that general business contacts akin to those present in *Perkins* must exist to assert jurisdiction over claims unrelated to those activities.

For these reasons, as demonstrated further below, this Court should grant certiorari to resolve the question presented, and to clarify which of the two now-competing approaches to analyzing minimum contacts for general jurisdiction is embodied in the due process clause.

I. The Circuits Are Widely Split on How to Assess Minimum Contacts Necessary For General Jurisdiction, and Thus on Whether Sales-Related Contacts Can Suffice

In discussing the appellate precedents, Respondent asserts that "the only thing that accounts for the different outcomes in these cases is their very different facts," and that cases finding a lack of jurisdiction merely "represent one end of a continuum," with the appellate courts conducting harmonious analyses of differing fact patterns. Opp. at 8-9. This characterization is clearly inaccurate. For example, the Fifth Circuit found general jurisdiction lacking where hundreds of millions of dollars of the defendant's products flowed into the forum state, aided by a network of seventeen independent in-forum distributors including a wholly owned subsidiary, and where the defendant "purchased over $195 million of goods and services from over 500 [forum state]

vendors." *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 372-73 (5th Cir. 1987). By contrast, the Second Circuit, viewing *Bearry* and the decisions of two other Courts of Appeals as not "particularly persuasive," found general jurisdiction on the basis of $4 million in sales over 6 years, relationships with independent distributors and contractors, and related sales support. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 571-73 (2d Cir. 1996).

Even when focusing only on the facts presented and the result reached, the circuit split is wide and clear. The decisions of the First, Fourth, Fifth and Eleventh Circuits take a limited approach to general jurisdiction, and find sales and sales-related contacts with the forum state to be insufficient minimum contacts for general jurisdiction.[1] On the other hand, the Federal, Second, Sixth, and Eighth Circuits have adopted a more expansive approach to general jurisdiction, under which similar sales-related contacts were found sufficient to support general jurisdiction.[2]

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[1] For example, the following decisions found no general jurisdiction: *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1198 (4th Cir. 1993) (annual sales of $9–13 million in the forum, promoted by 17-21 employees working there, 13 of whom lived in the forum, and advertising in local papers); *Bearry*, 818 F.2d at 372 (forum sales of aircraft and airframe assemblies amounting to more than $300 million over a five year period, through a network of 17 independent distributors, promoted by nationwide advertising); *Glater v. Eli Lilly & Co.*, 744 F.2d 213, 215 (1st Cir. 1984) (eight sales representatives, limited advertising and substantial sales of pharmaceutical products through wholesale distributors in forum state); *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 746 (4th Cir. 1971) (authority to do business, appointed agent for service of process, and five "detail men" promoting sale of drugs who were resident in forum); *Seymour v. Parke, Davis & Co.*, 423 F.2d 584, 585 (1st Cir. 1970) ("some half dozen New Hampshire salesmen, most of whom are New Hampshire residents"). .

[2] *E.g.*, *LSI Indus. Inc. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1370 (Fed. Cir. 2000) ("employs multiple distributors in Ohio and nets several millions of dollars per year from sales" there); *Metropolitan Life Ins. Co.*, 84 F.3d at 565-66 ("five [independent] Vermont dealers" and four "authorized builders" selling $4 million worth of products over six years); *Mich. Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 465 (6th Cir. 1989) (one "independent sales representative" and 400 total sales of

Thus, there can be no doubt about the existence of significantly divergent outcomes among the courts of appeals – that cases decided in several circuits would come out differently on the issue of the existence of minimum contacts if they were decided in certain other circuits. But this is no mere fact-specific split, in which courts applying the same legal standard or rule simply reach divergent outcomes by mistake or chance. To the contrary, the split reflects a fundamental difference of approach, which could not fail to produce different outcomes on similar or identical facts.

The circuit decisions aligned with the decision below, which take a broad view of general jurisdiction, regard their task as "balanc[ing] the facts of each case" between the "bookends" created by this Court, without a "formula," "precise checklist or . . . definitive litany of factors" to guide them. Pet. App. 12a, 14a n.3. With no principled basis for giving certain contacts greater significance than others, these courts then set out to "[n]avigat[e] the territory between *Perkins* and *Helicopteros*." Pet. App. 12a. Minimum contacts sufficient for general jurisdiction exist when there is a sufficient "confluence of . . . physical, economic and political presence." Pet. App. 17a.

The longstanding, and more traditional, approach looks not merely to the *quantity* of contacts with the forum, but draws *qualitative* distinctions depending on the nature of the contacts at issue. These qualitative distinctions are informed by this Court's decision in *Perkins*, in which headquarters-activities of a corporation exiled during World War II from the Philippines to Ohio were found a sufficient basis for general jurisdiction. These activities, and not simply the sale and marketing of products, were deemed the sort of "general business" presence adequate to support jurisdiction over

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furniture totaling $625,000 over two years); *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1074 (8th Cir. 2004), *cert. denied*, 543 U.S. 1147 (2005) (sales of paint through company-owned stores; no discussion of number of stores or amount of sales).

claims unrelated to the forum. *Helicopteros*, 466 U.S. at 415. The inquiry is whether corporate activities in the forum "sum to the general business presence found to exist in *Perkins*." *Bearry*, 818 F.2d at 375.

Of course, the notion of "qualitative" rather than merely "quantitative" distinctions antedates *Perkins*. *Int'l Shoe*, 326 U.S. at 319. Indeed, it traces back at least to the series of cases from this Court, decided in the first years of the twentieth century, which are discussed in the Petition, at 10-11, but never mentioned in the Opposition to Certiorari. *See People's Tobacco Co. v. Am. Tobacco Co.*, 246 U.S. 79, 85-87 (1918); *Simon v. S. Ry. Co.*, 236 U.S. 115, 130 (1914); *Green v. Chicago, Burlington & Quincy Ry. Co.*, 205 U.S. 530, 533 (1907); *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 20-22 (1907). At that time the Court made clear that business activities limited to sales and solicitation in the forum will not support jurisdiction over claims unrelated to those activities.[3]

Courts taking this approach include the First Circuit, which relies on a qualitative distinction between contacts akin to those present in *Perkins*, and those which exist when a company merely sells and promotes its products in the forum. In *Glater*, 744 F.2d at 216-217, the court first discussed the facts of *Perkins*, and then noted the reasoning of its own prior decision in *Seymour*, 423 F.2d 584, where it had "expressly distinguished *Perkins*" and concluded that where "defendant's only activities consist of advertising and employing salesmen to solicit orders, we think that fairness will not permit a state to assume jurisdiction." 744 F.2d at 217 (citing *Seymour*, 423 F.2d at 587). The court in *Glater* then applied similar reasoning to deny general jurisdiction where sales representatives marketed to doctors, pharmacies

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[3] These early twentieth century cases have played an important role in the analysis of some appellate courts which distinguish between sales-related and general business contacts. *See, e.g., Nichols*, 991 F.2d at 1199-1200 (citing *People's Tobacco* and *Green*); *Wainscott v. St. Louis-San Francisco Ry. Co.*, 351 N.E.2d 466, 471, 474 (Ohio 1976) (same).

and hospitals, and sales were made through a network of in-state distributors. *Id.*

The Fourth Circuit, as reflected in *Nichols*, takes the same approach. The court there noted that the availability of specific jurisdiction meant that "broad constructions of general jurisdiction should be generally disfavored." 991 F.2d at 1200. Referencing its own decision in *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745, 748 (4th Cir. 1971), the court asked whether "advertising and solicitation activities constitute the type of continuous corporate operation within a forum state that justifies general jurisdiction." 991 F.2d at 1199. The court ultimately found its decision "controlled by *Ratliff's* rule that [such] activities alone do not constitute the 'minimum contacts' required for general jurisdiction." *Id.* at 1200.

Similarly, in *Bearry*, the Fifth Circuit quoted and expressly rejected the trial court's reasoning that the injection of "an enormous stream of commerce into the forum" – there in the form of product sales exceeding $300 million over five years – was sufficient to support general jurisdiction. "We disagree with the district court's conclusion that the 'stream of commerce' will support a finding of general jurisdiction." 818 F.2d at 375. Many other courts have predicated denials of general jurisdiction on similar qualitative reasoning, by which sales-related activities standing alone are so unlike the activities present in *Perkins* as to be categorically insufficient.[4]

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[4] *See, e.g., Harlow v. Children's Hosp.*, 432 F.3d 50, 64-65 (1st Cir. 2005) (inquiring "whether defendant's contacts with forum state constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*," and holding that "deriv[ing] substantial and constant revenue" from the forum does not suffice); *Associated Transp Line, Inc. v. Productos Fitosanitarios Proficol El Carmen S.A.*, 197 F.3d 1070, 1075 (11th Cir. 1999)("General jurisdiction has been found lacking even where a company had employees, agencies and salespeople regularly in the forum; . . . and derived more than 26% of its income from the forum."); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990) (citing *Perkins* for the proposition that "contacts of a more extensive quality and nature are required" for the

Respondent offers two objections to framing the Question Presented in terms of the sufficiency of "sales-related activities" to support general jurisdiction. First, Respondent argues that minimum contacts were established in this case on the basis of activities that were not sales-related. Second, Respondent further argues that the phrase is so vague that it would merely lead to further litigation as lower courts debate its meaning. *See* Opp. at 16-18. Both contentions are wrong.

The contacts at issue in this case, with one exception, are directly related to Petitioner's local sales. Petitioner obtained a business license that allows it to make sales, hires a sales force of several dozen to make the sales, leases an office to provide workspace for six or seven of its sales representatives, hires a warehouse to store products being sold locally, advertises to compete for sales against rival manufacturers, and has supported political activities in an attempt to prevent its advertising from being banned. *See* Pet. at 3. Only its medical research grant to the University of Washington – which the district court below found too inconsequential to mention (*see* Pet. App. 33a-37a) – is not directly related to local sales. It is implausible in the extreme to suppose that such a grant to support research in

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assertion of general jurisdiction, and finding that 12.9% of nationwide revenue and advertising in the forum does not connote a "general presence in the state"); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir. 1994) ("*Perkins'* holding that the cause of action need not arise out of the defendant's activities in the forum is limited to its unusual facts," and "no court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert jurisdiction in an unrelated cause of action."); *Price & Sons v. Second Judicial Dist. Ct.*, 831 P.2d 600, 601 (Nev. 1992) ("Sales and marketing efforts in the forum by a foreign corporation, without more, are insufficient to establish . . . the high level of contact . . . . necessary [for] general jurisdiction."); *Fisher Governor Co. v. Superior Ct.*, 347 P.2d 1, 3 (Cal. 1959) (Traynor, J.) (after discussing *Perkins*, court held that "more contacts are required for the assumption of [general] jurisdiction than sales and sales promotion within the state").

the forum could be the critical contact making general jurisdiction sustainable.[5]

Nor should the Petition be denied on the ground that "sales-related activities," a phrase Petitioner used in its "Question Presented," are difficult to define. While admittedly the activities of any business are not susceptible to division into hermetically-sealed categories having no connection to each other, the category of activities directly related to the sale and marketing of products has been seen as a coherent one by many courts, including this one. Indeed Respondent answers his own criticism, when he aptly defines "sales-related contacts" as including "a physical salesroom or sales office, . . . advertising, a license to do business in the state, [a] number of employees and their sales-related duties, and the payment of sales taxes." Opp. at 9.

II. The Question Presented Was Thoroughly Aired In The Court Below

Respondent argues initially that "the Question Presented was neither raised nor decided below." Opp. at 6; *accord id.* at 1, 6-8, 19. While this Court has never suggested that the precise formulation of the Question Presented must be asserted or decided below in order for the issue to be preserved, Respondent's assertion, in any event, is wholly contrary to the facts. Both the Ninth Circuit's decision and Petitioner's brief before that court discussed at length whether Petitioner's activities created sufficient "minimum contacts" to permit the exercise of general jurisdiction. The focus of both the decision and the argument below was on the jurisdictional significance of Petitioner's sales in the forum state and the local activities Petitioner undertook to generate those sales. *See* Pet. App. 10a-17a; Appellant's Br. at 1-2, 11, 13-19.

Petitioner argued below, as it does before this Court, that "[n]either Reynolds' product sales in the State of

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[5] Apparently, Respondent also placed no importance on the medical research grant, since there was no mention of it in Respondent's merits brief on appeal. *See* Appellee's Br. at 7, 21-23.

Washington (while significant in volume), nor Reynolds' limited activities in the nature of local sales support, constitute the sort of presence that warrants the draconian imposition of *general* jurisdiction ...." *Id.* at 13-14. Indeed, though the wording is different, the "Question Presented" in the Petition for Writ of Certiorari is substantively identical to "Statement of the Issues" number 1 of Petitioner's Ninth Circuit Brief, which asks:

> 1. Whether a non-resident corporation, which is not headquartered or incorporated in the State of Washington, that conducts limited activities in the State to support its local product sales (similar in kind to its activities in every other state) is subject to general jurisdiction in Washington to adjudicate a claim that (1) does not involve any of the corporation's sales and activities in the State of Washington; and (2) arises from the marketing or consumption of products in the Republic of the Philippines.

Appellant's Br. at 1-2.

III. The Need For Review By This Court Is Compelling

It is clear that courts in this country are heading down two divergent paths when faced with the sufficiency of minimum contacts to support general jurisdiction. This is an important issue (as Respondent does not dispute), and this case presents an excellent opportunity for this Court to provide needed clarification.

Because the law of general jurisdiction is unclear, businesses that sell products in numerous jurisdictions cannot predict where they may properly be subject to suit, notwithstanding this Court's direction that the legal system should afford "a degree of predictability." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Pet. at 19-20. Likewise, because the law is unclear, there is frequent litigation over jurisdictional issues, notwithstanding this Court's recognition that such litigation is "essentially a

waste of time and resources." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980). Pet. at 23-25.

Insofar as the approach taken by some courts has led to an improperly expansive exercise of general jurisdiction, the result is to encourage forum shopping, notwithstanding substantial reasons to foreclose litigation in fora that lack any connection to the subject matter of the lawsuit. Pet. at 20-21. Likewise, the unduly expansive exercise of general jurisdiction is sufficiently offensive from the perspective of many foreign legal systems that it has had a significant adverse impact on foreign trade relations. *Id.* at 21-22.

Because most state long arm statutes extend to the full limit of the due process clause, enforcement of a proper standard is critical to the allocation of judicial power between various state and federal courts. The issue thus raises substantial federalism concerns, as recognized in this Court's admonition that the States, through their courts, "not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp.*, 444 U.S. at 292. Pet. at 22-23.

This case affords an especially appropriate vehicle for clarifying general jurisdiction. Respondent alludes to hypothetical fact questions that may arise in cases that also implicate specific jurisdiction (Opp. at 17), but this case raises no such issues. Respondent's claim matured during the 65 years that he lived in the Philippines, *id.*, and he concedes that his claim lacks any connection to the eight days that he lived in Washington before filing suit, or to any of Reynolds' activities in Washington. Pet. App. 7a. Thus, this case squarely (and solely) presents a question of general jurisdiction: that is, whether Reynolds' activities in Washington support jurisdiction in that State to adjudicate a claim that arose and matured in the Philippines.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRADLEY S. KELLER
BYRNES & KELLER, LLP
1000 Second Avenue,
38th Floor
Seattle, WA 98104
(206) 622-2000

DONALD B. AYER
(Counsel of Record)
ROBERT F. MCDERMOTT, JR.
PAUL S. RYERSON
JONATHAN B. BERMAN
CHARLES T. KOTUBY, JR.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

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